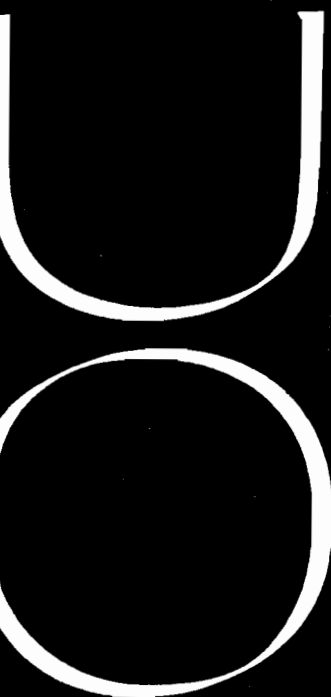


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UNIVERSITY
OF OREGON



OFFICIAL COMMENTARY TO
THE REVISED OREGON
NONPROFIT CORPORATION ACT

The University of Oregon School of Law

Eugene, Oregon
97403

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To arrange interviews, circulate job descriptions, or secure further information about the Placement Program, please telephone or write Mervyn Loya, Assistant Dean for Administration, or Dina Jian, Placement Coordinator, University of Oregon School of Law, Eugene, Oregon 97403, telephone (503) 346-3847.

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Preface

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In 1988, the Business Law Section of the Oregon State Bar accepted the challenge of revising Oregon nonprofit corporation law. The Model Nonprofit Corporation Act Task Force was subsequently formed and began work in the Spring of 1988. The Task Force was primarily comprised of practicing attorneys from Oregon.

During the drafting process, the Task Force relied most heavily on the American Bar Association's Revised Model Nonprofit Corporation Act. In addition, the Oregon Task Force incorporated both private corporation law (Oregon Revised Statutes Chapter 60) and the former Oregon nonprofit act (Oregon Revised Statutes Chapter 61) into their revisions. After enlisting the expertise of the Oregon Attorney General's Office and the Oregon Office of Legislative Counsel, the Task Force submitted the revised nonprofit act (Oregon Revised Statutes Chapter 65) to the Oregon legislature. The legislature adopted Oregon Revised Statutes Chapter 65 in May of 1989.

In December of 1991, the *Oregon Law Review* agreed to publish the Official Commentary to the Revised Oregon Nonprofit Corporation Act. At this time, the commentary required some minor editing. The Oregon legislature had made several changes to the bill that the Task Force submitted, rendering certain commentary superfluous or incorrect. Moreover, the Task Force created additional commentary in 1991 to accompany 1991 revisions to Oregon Revised Statutes Chapter 65. Consequently, the primary function of the *Oregon Law Review* was to update the commentary.

The goal of the *Oregon Law Review* has been to create a useful practice tool for nonprofit lawyers, directors, and participants. To accomplish this, the editing team preserved the integrity of the commentary. Once the 1989 commentary was reconciled with the 1989 version of Chapter 65, the editing team integrated all 1991 amendments and corresponding commentary. This process resulted in a completely updated version of the commentary to the Revised Oregon Nonprofit Corporation Act as of the 1991 legislative session.

The *Oregon Law Review* wishes to thank all those who made this project possible. Those organizations and individuals include the

Model Nonprofit Corporation Act Task Force, the Oregon Secretary of State's Office, Jeffrey Wolfstone, Professor Charles O'Kelley, Dean Maurice Holland, and Dean Dave Frohnmayer.

THE MANAGING BOARD

Introduction

This Oregon Commentary has been prepared by the Model Nonprofit Corporation Act Task Force of the Business Law Section of the Oregon State Bar. The Task Force drafted the Bill after an extensive review and comparison of the following sources:

- (1) The Revised Model Nonprofit Corporation Act, adopted by the American Bar Association in 1987;
- (2) The Oregon Business Corporation Act, based on the Revised Model Business Corporation Act (1984), as adopted by the Oregon Legislative Assembly in 1987 and codified in ORS Chapter 60; and
- (3) The Oregon Nonprofit Corporation Law as codified in ORS Chapter 61, originally enacted by the Oregon Legislative Assembly in 1959 and based on the unrevised Model Nonprofit Corporation Act.

This Oregon Commentary compares the Bill section-by-section with each of these sources. Additional comments are furnished where applicable. In most instances, the Bill is based on the Model Act, with revisions to parallel the comparable provisions of the Business Corporation Act.

The Model Act is accompanied by Official Comments prepared by the Subcommittee on the Model Nonprofit Corporation Law of the Business Law Section, American Bar Association. The Oregon Commentary is intended to provide a similar resource for the Bill. Except where the Bill differs from the Model Act, the Official Comments on the Model Act apply to the Bill and are incorporated herein. This Oregon Commentary, together with the Model Act Official Comments, is intended to provide a guide to interpreting the provisions of the Bill.

Defined Terms

“Bill”	means House Bill 2278 B-Engrossed as introduced into the 1989 regular session of the Oregon Legislative Assembly, as amended by Senate Bill 426 as introduced into the 1991 regular session of the Oregon Legislative Assembly.
“Model Act”	means the Revised Model Nonprofit Corporation Act as adopted by the Subcommittee on the Model Nonprofit Corporation Law of the Business Law Section, American Bar Association (summer, 1987), in the official text published in 1988 by Prentice Hall Law & Business.
“Existing Law”	means Oregon law as of January 1, 1989.
“ORS”	means Oregon Revised Statutes, 1991 edition, published by the Legislative Counsel Committee of the Legislative Assembly of the State of Oregon.
“Commissioner”	means the Oregon Corporation Commissioner.
“Division”	means the Corporation Division of the Oregon Secretary of State.
“Business Corporation Act”	means ORS Chapter 60.
“Task Force”	means the Model Nonprofit Corporation Act Task Force of the Business Law Section of the Oregon State Bar.
“Chapter 61”	means ORS Chapter 61, the Oregon Nonprofit Corporation Law.

EXECUTIVE SUMMARY OF PROPOSED REVISED OREGON NONPROFIT CORPORATION ACT

The proposed legislation was prepared by a task force of the Business Law Section of the Oregon State Bar. The purpose of the legislation is to replace the current Oregon Nonprofit Corporation Law set forth in ORS Chapter 61.

There are three principal reasons for proposing the new Oregon Nonprofit Corporation Act. First, the new legislation will bring the Nonprofit Corporation Act into conformity with the Business Corporation Act (ORS Chapter 60), which was overhauled in the 1987 Oregon Legislature. This conformity will not only lead to greater certainty and uniformity in corporation law generally, but it will also facilitate the administrative functions performed by the office of the Secretary of State. Moreover, because the proposed legislation is based on the Revised Model Nonprofit Corporation Act adopted by the American Bar Association in 1987, over the years the new legislation should provide a good foundation from which to deal with new issues as they arise in Oregon and in other jurisdictions across the country.

Second, the substance of the proposed legislation addresses a number of areas that are ambiguous in the current law. Because the proposed legislation better defines the relationships among members, directors, officers and others, those involved with nonprofit corporations will be better able to plan for and observe their rights and obligations. Among the areas that the proposed legislation will clarify are corporate purposes, derivative suits, court-ordered meetings, record date for meetings, rights of inspection of membership lists, and distribution of assets on dissolution. The general approach is to allow substantial flexibility in recognition of the fact that existing nonprofit corporations, as well as those to be formed in the future, serve a diverse range of needs and objects. A paramount concern in drafting the new legislation has been to honor the expectations of existing nonprofit corporations.

And third, the proposed legislation is designed to promote “user friendliness.” It is recognized that many nonprofit corporations do not have the resources to retain legal counsel on a regular basis.

The existing law is broad, but does not provide much guidance to deal with the increasingly complex environment faced by today's nonprofit corporations. Thus, while the proposed legislation is relatively lengthy, it provides a better road map for the casual user. This is accomplished both in the structure of the Act as well as through the greater detail in which each particular subject is addressed.

It should be noted that a substantial amount of thought has been given to the scope of the proposed legislation. There are many additional issues that might have been addressed, but which were not. For example, it would have been possible to propose significant changes in the exoneration and indemnification of officers and directors; however, in this regard the task force felt that it was inappropriate to substantially alter the balance established in the 1987 tort reform legislation. By way of further example, the task force could have attempted to address the problems of fraud and misrepresentation in the course of charitable solicitations; in this regard, the task force determined that it was beyond the scope of corporate law to determine whether the existing protections are in fact adequate or whether further legislation is appropriate. The scope is confined to the issues addressed by the existing Act and the Model Act.

The commentary that follows consists of:

- (a) A separate summary for each chapter or group of related chapters.
- (b) A section-by-section commentary that compares the proposed legislation to the Business Corporation Act, to the existing Nonprofit Corporation Law and to the Model Act.

GENERAL PROVISIONS, ORGANIZATION, PURPOSES AND POWERS, NAMES, AND OFFICE AND AGENT

The proposed revisions ease some of the unnecessary technical requirements of the prior act with respect to the need for a corporate "office," use of duplicate and "true" copies, handling of the organizational meeting, signatures of all incorporators on documents, and inclusion of director addresses in the articles which are public documents. They also provide greater clarity and cues for lay users by such devices as inclusion of a notation that tax considerations may call for voluntary restriction of available corporate powers and clearer cross-references to statutorily defined terms which otherwise easily might be misinterpreted. Quorum and no-

tice requirements for membership actions have been eased to reflect the extensive membership in many nonprofit corporations, and the varied channels appropriate to communicating most matters to them are recognized. "Default provisions" have been added to remedy gaps in documents which otherwise cause problems.

Where the substance is the same, the language of parallel provisions in the Business Corporation Act has been used in order to facilitate use of this chapter by those more familiar with ORS Chapter 60 and to gain the interpretation advantages of that chapter, for which more extensive court commentary is available. Immunity provisions parallel to those authorized by the Business Corporation Act have been added, but extended to cover uncompensated officers. Loans to officers and directors have been explicitly prohibited, however. Wherever practical, the new provisions have been framed so as to avoid the need for existing corporations to amend their articles or bylaws solely because of the proposed statutory changes.

Inconsistencies in various previously uncoordinated sections (such as in sections concerning presumptions created by filing) have been corrected. Prior ambiguities in the definition of "member" for purposes of acquiring statutory rights and uncertainties in the method of challenge of disputed acts of the Secretary of State (contested case versus final order under the APA) have been clarified. Deviation by the Secretary of State from literal compliance with archaic statutory procedures (by elimination of separate certificates of incorporation and duplicate mailings, for example) have been reflected in the updated statutory provisions. Circular definitions have been given meaningful content.

Structures unique to the nonprofit context are explicitly recognized and their authorized roles stated (e.g., "members" and "delegates"). Definitions have been expanded to facilitate the proposal's new tripartite classification system for public benefit corporations, mutual benefit corporations, and religious corporations. Authorization of special emergency powers and bylaws was included to facilitate health and other public benefit group responses in time of disaster.

Notice to the Attorney General about crucial events involving public benefit corporations is enhanced and the Attorney General has been given express derivative enforcement powers over public

benefit corporations. Penalties for filing false documents have been added, consistent with provisions of the criminal code.

Finally, the requirement that nonprofit corporations not have *any* "for-profit" purposes was eliminated based on the conclusion that state nonprofit corporation status does not, alone, convey tax or other benefits, and that the distribution provisions and Attorney General powers provide adequate safeguards against abuse.

MEMBERS AND MEMBERSHIPS

A nonprofit corporation need not have members. But if it does, the members (although not owners of the corporation) generally have a role in governing the corporation similar to that of stockholders in a business corporation.

The proposed Act accommodates the broad diversity of rights and duties that various corporations afford their members. The proposed Act limits the term "member" for purposes of the proposed Act to those persons who can vote on more than one occasion for the election of a director or directors. The definition recognizes that some corporations may use the term "member" to describe persons who have no voting rights and thus are not "members" under the proposed Act. The proposed Act authorizes corporations to have delegates rather than, or in addition to, members.

The proposed Act allows a corporation to establish its own standards for membership, which may or may not require valuable consideration. A person must consent to being a member; for example, a nonprofit corporation cannot designate all the citizens of Oregon as its members. All members have equal rights, except as the articles or bylaws have established differences.

Memberships in mutual benefit corporations may be freely transferable, but membership in a public benefit or religious corporation may not be transferred for value (except where the member itself is a public benefit or religious corporation). Similarly, a mutual benefit corporation may acquire for value the membership of an exiting member, but a public benefit or religious corporation generally may not do so.

A member may be liable for dues, assessments or fees, but only if the member has acquiesced. Like stockholders, members generally have no personal liability to third parties for the corporation's obli-

gations and are protected from a creditor's action against the corporation.

A nonprofit organization cannot force a person to belong to it. A member may resign at any time, although a former member may be liable for obligations incurred prior to resignation. The corporation may expel or suspend a member or terminate a membership only through a procedure that is fair, reasonable, and in good faith.

The proposed Act authorizes derivative suits on behalf of nonprofit corporations, through a procedure similar to such suits on behalf of business corporations. The task force concluded that a derivative suit could be brought under current law. The proposed Act clarifies who may bring derivative suits, the requirement of a prior demand on the board, court approval of any settlement or discontinuance, award of costs and counsel fees, notice to the Attorney General, and exhaustion of internal remedies.

MEMBERS MEETINGS AND VOTING

The procedures in the proposed Act for membership meetings generally parallel those in the Business Corporation Act for shareholders' meetings.

The proposed Act specifies the procedure for call and notice of annual, regular and special meetings. Members holding 5% of the voting power may demand a special meeting. The circuit court may order a meeting to be held if the corporation has failed to hold it.

Notice of meetings must be given in a fair and reasonable manner, and the proposed Act provides a safe harbor satisfying this requirement. As under the current nonprofit corporation law, seven days from mailing is sufficient notice. The proposed Act limits this seven-day safe harbor to notice by first class or registered mail. Another method of notice — for example by publication, by posting, or by oral announcement — may be fair and reasonable even though it is not within the safe harbor.

The Act applies the concept of record date, which exists in business corporation law, to nonprofit corporations. The record dates are the precise dates for determining the members who are entitled to various rights. This record date statute codifies the way most nonprofit organizations operate and will apply automatically, unless the corporation has its own provisions.

The members' list for a meeting is to contain membership dates,

which will permit determining who the members were as of any record date. As under current law, the list of members must be available for inspection for a proper purpose; however, political or social action public benefit corporations may limit or abolish the rights to inspect and copy by so providing in their articles if they provide a reasonable means of mailing commentary to their members. The proposed Act supplies a procedure for resolving disputes over access to the membership list.

The proposed Act defines the vote necessary for approval by the members, and the proposal allows such approval to be gained in several ways in addition to voting in person. Members may act through a written consent of all of the members, through proxy voting, through written ballots, or through a conference telephone call. Generally one member will have one vote, but the corporation may specify weighted, cumulative, or preferential voting or specify voting by class, chapter, or region. Voting agreements are allowed.

As under current law, there is no minimum quorum for meetings of members, unless the articles or bylaws impose it. The proposed Act requires certain amendments affecting quorum or voting requirements to be submitted to the members for approval. The proposed Act adds definite standards for acceptance or rejection of a member's vote. Provisions for adjournment are added.

DIRECTORS AND OFFICERS

The proposed Act generally tracks the current statutory provisions regarding directors and officers, although certain changes and clarifications have been made and are described below. Members of the board of directors are specifically required to be individuals. The board's power to delegate, and thus be relieved from duties and responsibilities normally exercised by it, has been broadened. As in other parts of the proposed Act, there is a distinction between corporations with members and those without. Unless a corporation has members, directors are elected, appointed, or designated as provided in the articles or bylaws, or by the board. Otherwise, the members of a corporation are entitled to elect the directors except to the extent the articles or bylaws provide to the contrary. Unless directors are appointed or designated, there is a five-year limit on the term of the directors, although a director remains in office until a successor has been named. The term of a director who fills a va-

cancy in the office of a director elected by members expires at the next election of directors, not at the end of the unexpired term.

Provisions of the proposed statute not previously found in ORS Chapter 61 include those discussing director resignation, the removal of directors elected by the board, the removal of appointed or designated directors, and the judicial removal of directors. Religious corporations are subject to lesser limitations regarding removal procedures. While the proposed statute offers additional rights to members and enables the Attorney General to participate in the judicial removal of directors in public benefit corporations, the proposed statute offers more flexibility for religious corporations. The proposal provides a specific mechanism for replacing appointed and designated directors, and the sections regarding vacancies and the effective date of action taken without a meeting are discussed in more detail than under current law. The proposal also distinguishes between the regular and special meetings of the board of directors and the notice required for each. The current statutory provisions concerning the effect of the attendance of a director at a meeting have been expanded.

Not unlike current law, the proposed Act establishes a minimum quorum of directors. The mechanics of committee creation and operation is discussed with greater specificity. The proposed section regarding the general standards of conduct for directors is broader and more comprehensive than the present provision. The proposed Act contains a conflict of interest section, unlike existing law. The provision governing loans to directors and officers is expanded to include guarantees. Provisions concerning directors' liability for unlawful distributions are also new.

A section has been added describing the duties of officers. The Act sets forth a standard of conduct for officers that parallels the standard applicable to directors. The provision governing the removal of an officer is expanded to include a discussion of the resignation of an officer. The proposal emphasizes that the mere appointment of an officer does not create contractual rights and that the officer's removal or resignation does not affect the parties' contractual rights.

Definitions specifically applicable to the indemnification subchapter have been included. The provision regarding mandatory indemnification requires that a director be wholly successful, either on the merits or otherwise. Furthermore, the director will be re-

quired to provide a written affirmation concerning the director's conduct. Standards for court ordered indemnification, not found in the existing statute, have been added. The proposal also contains a separate section governing the indemnification of officers, employees, and agents.

AMENDMENT OF ARTICLES OF INCORPORATION AND BYLAWS

This proposal adds useful clarification and a few new provisions to existing law.

Under this proposed Act, the board of directors may adopt certain routine or nonsubstantive amendments to the articles without approval of members or any other third person, where the changes do not adversely affect members' rights. A corporation may, however, elect by a provision in its articles not to allow amendment of articles without member approval. One new provision also allows amendment of articles by incorporators prior to the choosing of directors.

The general rule is still that the board and the members must approve amendment of articles. A corporation may also require approval of article amendments by specified third persons. This gives greater flexibility. It permits a nonprofit "subsidiary," for example, to have its article amendments subject to the veto of its "parent," without the parent being the sole member of the subsidiary.

The proposed Act introduces new provisions to allow the board or the members to increase the vote required to amend articles, requires board approval for certain article amendments for public benefit or religious corporations, and permits approval by either the board or the members to be conditional. If there are different classes of members, detailed rules for class voting are provided. Articles may be amended by a court to carry out a plan of reorganization.

Restated articles may be adopted without approval of members or any specified third party, where they consist of amendments previously approved by members or such third party.

Where a board has the power to amend bylaws, this chapter provides for the notice of the meeting to contain more detailed information than provided under current law. The board has sole power to amend bylaws unless the articles or the Nonprofit Corporation Act reserve the power to the members, or to a specified third party,

in whole or in part. Members may amend bylaws even though the board may also amend them. Members can also prevent the board from amending any particular bylaw that the members amend or repeal.

MERGER

The key difference between the proposed Act and existing ORS Chapter 61 provisions is that the proposal permits a nonprofit corporation to merge with a business corporation, with certain restrictions where a public benefit or religious corporation is involved. This authority would significantly reduce the logistical requirements to consummating legitimate transactions which currently can be achieved only through a series of mergers following multiple incorporations, both foreign and domestic, or through similarly indirect and illogical procedures to reach the desired goal. The proposed Act contains restrictions which are ample to protect against abuse where the public interest is involved.

The proposed Act also has the advantage of being generally parallel to the comparable provisions of ORS Chapter 60. The presentation is somewhat clearer, better organized, and more concise than existing ORS Chapter 61.

Finally, the proposed Act contains a specific provision on the effect of a merger on bequests, devises and gifts, which may serve as a useful reminder to persons contemplating such a merger.

SALE OF ASSETS

The proposed Act is comparable to existing ORS Chapter 61 with respect to a sale of all or substantially all of a corporation's assets outside the regular course of activities, which requires member approval. Unlike ORS Chapter 61, however, the proposal does not require member approval of sales of all, or substantially all, of a corporation's assets in the ordinary course of its activities or mortgages of such assets. This will significantly lessen the procedural burden placed on nonprofit corporations involved in such common activities as buying a piece of equipment (which may represent virtually all of its assets) on an installment sale basis. Corporations that wish to retain a member approval requirement may include such a provision in their articles of incorporation.

The proposed Act is generally parallel to the comparable provi-

and repeal provisions required to give orderly effect to the proposed legislation.

Oregon Revised Statutes Chapter 65

1991 EDITION

Nonprofit Corporations

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GENERAL PROVISIONS

(DEFINITIONS)

65.001 DEFINITIONS

As used in this chapter, unless otherwise specifically provided:

(1) "Anniversary" means that day each year exactly one or more years after the date of filing by the Office of the Secretary of State of the articles of incorporation in the case of a domestic corporation or the date of filing by the Office of the Secretary of State of an application for authority to transact business in the case of a foreign corporation. An event which would otherwise cause an anniversary to fall on February 29 shall be deemed to have occurred on February 28.

(2) "Approved by the members" or "approval by the members" means approved or ratified by the members entitled to vote on the issue through either:

(a) The affirmative vote of a majority of the votes of such members represented and voting at a duly held meeting at which a quorum is present or the affirmative vote of such greater proportion including the votes of any required proportion of the members of any class as the articles, bylaws or this chapter may provide for specified types of member action; or

(b) A written ballot or written consent in conformity with this chapter.

(3) "Articles of incorporation" or "articles" include amended and restated articles of incorporation and articles of merger, and corrections thereto.

(4) "Board" or "board of directors" means the individual or individuals vested with overall management of the affairs of the domestic or foreign corporation, irrespective of the name by which the individual or individuals are designated, except that no individual or group of individuals are the board of directors because of powers delegated to that individual or group pursuant to ORS 65.301.

(5) "Bylaws" means the code or codes of rules, other than the articles adopted pursuant to this chapter or the laws governing a foreign corporation for the regulation or management of the affairs of the domestic or foreign corporation, irrespective of the name or names by which such rules are designated.

(6) "Class" means a group of memberships which have the same

rights with respect to voting, dissolution, redemption and transfer. For the purpose of this section, rights shall be considered the same if they are determined by a formula applied uniformly.

(7) "Contact address" means a mailing address at which a person affiliated with the organization will receive and transmit to the organization notices intended for the foreign or domestic corporation when it is either not practical to send such notices to the registered agent, or a duplicate notice is desirable. The contact address may be the principal place of business, if any, or the business or residence address of any person associated with the corporation or foreign corporation who has consented to serve, but shall not be the address of the registered agent.

(8) "Corporation" or "domestic corporation" means a nonprofit corporation which is not a foreign corporation, which is incorporated under or subject to the provisions of this chapter.

(9) "Delegates" means those persons elected or appointed to vote in a representative assembly for the election of a director or directors or on other matters.

(10) "Deliver" includes mail.

(11) "Directors" means individuals designated in the articles or bylaws or elected by the incorporators to act as members of the board, and their successors.

(12) "Distribution" means the payment of a dividend or any part of the income or profit of a corporation to its members, directors or officers, and does not include payment of value for property received or services performed or payment of benefits in furtherance of the corporation's purposes.

(13) "Effective date of notice" has the meaning given that term in ORS 65.034.

(14) "Employee" does not include an officer or director who is not employed by the corporation with compensation for services beyond those encompassed by board membership.

(15) "Entity" includes a corporation, foreign corporation, business corporation and foreign business corporation, profit and nonprofit unincorporated association, corporation sole, business trust, estate, partnership, trust, two or more persons having a joint or common economic interest, any state, the United States and any foreign government.

(16) "File," "filed" or "filing" means reviewed, accepted and entered in the Office of the Secretary of State.

(17) "Foreign corporation" means a corporation organized under a law other than the law of this state which would be a nonprofit corporation if formed under the laws of this state.

(18) "Governmental subdivision" includes an authority, county, district and municipality.

(19) "Includes" denotes a partial definition.

(20) "Individual" means a natural person and includes the guardian of an incompetent individual.

(21) "Means" denotes an exhaustive definition.

(22)(a) "Member" means any person or persons entitled, pursuant to a domestic or foreign corporation's articles or bylaws, without regard to what a person is called in the articles or bylaws, to vote on more than one occasion for the election of a director or directors.

(b) A person is not a member by virtue of any of the following rights the person has:

(A) As a delegate;

(B) To designate or appoint a director or directors;

(C) As a director; or

(D) As a holder of an evidence of indebtedness issued or to be issued by the corporation.

(c) Notwithstanding the provisions of paragraph (a) of this subsection, a person is not a member if the person's membership rights have been eliminated as provided in ORS 65.164 or 65.167.

(23) "Membership" refers to the rights and obligations a member or members, as defined in this chapter, have pursuant to this chapter.

(24) "Mutual benefit corporation" means a domestic corporation which either is formed as a mutual benefit corporation pursuant to ORS 65.044 to 65.067, is designated a mutual benefit corporation by a statute or does not come within the definition of public benefit or religious corporation.

(25) "Nonprofit corporation" means mutual benefit corporations, public benefit corporations and religious corporations.

(26) "Notice" has the meaning given that term in ORS 65.034.

(27) "Office" when used to refer to the administrative unit di-

rected by the Secretary of State, means the Office of the Secretary of State.

(28) "Person" includes any individual or entity.

(29) "Principal office" means the place, in or out of this state, so designated in the most recent annual report filed pursuant to ORS 65.787 or if no annual report is on file, as designated in the articles of incorporation, or the application for authority to transact business in this state, which shall be the place where the principal executive offices of a domestic or foreign corporation are located, or if none, the contact address.

(30) "Proceeding" includes civil, criminal, administrative and investigatory action.

(31) "Public benefit corporation" means a domestic corporation which:

(a) Is formed as a public benefit corporation pursuant to ORS 65.044 to 65.067, is designated as a public benefit corporation by a statute, is recognized as tax exempt under section 501 (c) (3) of the Internal Revenue Code of 1986 or is otherwise organized for a public or charitable purpose;

(b) Is restricted so that on dissolution it must distribute its assets to an organization organized for a public or charitable purpose, a religious corporation, the United States, a state or a person which is recognized as exempt under section 501 (c) (3) of the Internal Revenue Code of 1986; and

(c) Does not come within the definition of "religious corporation."

(32) "Record date" means the date established under ORS 65.131 to 65.177 or 65.201 to 65.254 on which a corporation determines the identity of its members and their membership rights for the purposes of this chapter. The determinations shall be made as of the time of close of transactions on the record date unless another time for doing so is specified at the time the record date is fixed.

(33) "Religious corporation" means a domestic corporation which is formed as a religious corporation pursuant to ORS 65.044 to 65.067, is designated a religious corporation by a statute or is organized primarily or exclusively for religious purposes.

(34) "Secretary," when used in the context of a corporate official, means the corporate officer to whom the board of directors has delegated responsibility under ORS 65.371 for preparing the min-

utes of the directors' and members' meetings and for authenticating the records of the corporation.

(35) "State" when referring to a part of the United States, includes a state, commonwealth, territory and insular possession of the United States and its agencies and governmental subdivisions.

(36) "Uncompensated officer" means an individual who serves in an office without compensation for personal service. Payment solely for actual expenses in performing duties of the officer or a stipend which is paid only to compensate the average expenses incurred over the course of a year shall not be deemed to be compensation.

(37) "United States" includes district, authority, bureau, commission, department and any other agency of the United States.

(38) "Vote" includes authorization by written ballot and written consent, where permitted.

(39) "Voting power" means the total number of votes entitled to be cast on the issue at the time the determination of voting power is made, excluding a vote which is contingent upon the happening of a condition or event which has not occurred at the time. Where a class is entitled to vote as a class for directors, the determination of voting power of the class shall be based on the percentage of the number of directors the class is entitled to elect out of the total number of authorized directors. [1989 c.1010 § 14; 1991 c.231 § 1]

OFFICIAL COMMENT TO ORS 65.001 (MODEL ACT § 1.40)

(1) *Proposed Changes to the Model Act*: Specific language of numerous Model Act definitions has been conformed to ORS Chapter 60, without substantive change except as noted. Additional definitions have been added from ORS Chapter 60 for "anniversary" and "office," since those terms are used in sections revised to conform to Chapter 60, and "nonprofit corporation" (which is used elsewhere in the statutes) is defined.

Several changes are made in the Model Act's definition of "approved by the members." First, consistent with the authority of the corporation to vary members' voting rights under ORS 65.144, Model Act § 6.10, the definition refers only to those members with power to vote on the particular transaction. Second, subdivisions are introduced for clarity. Third, the parenthetical clause referring to supermajority requirements is moved to a more logical place. Fourth, the Model Act's requirement that effective action can only

be taken by vote which is *both* a majority of those voting *and* a majority of a quorum was rejected. (In many nonprofit organizations membership is freely bestowed on contributors, many of whom attend only to vote on some specific issue of interest. Requiring a majority of a quorum for any action at a meeting would frequently stalemate such organizations.)

The definition of "articles" has been expanded to include corrections thereto.

The Model Act's circular definition of "board" has been corrected, and as revised, allows a one-person board (other than for public benefit corporations), consistent with ORS 65.307 and ORS 61.011(3).

"Corporation" has been redefined to exclude foreign corporations, since they do not follow all the internal operational rules of this state.

A new concept of "contact address" has been introduced to facilitate communication when no registered agent has been appointed, or if appointed, has resigned. It is intended to deal with the Corporation Division's inability to use the principal business address (as traditionally defined) in that circumstance since nonprofit corporations frequently lack a real business address. The definition of contact address is accordingly included in the definition of "principal office." (See the effect in ORS 65.117(2)).

"Distribution" has been redefined to include any transfer at any time to an officer, director or member if it is not in exchange for reasonable value for property or services received.

The definition of "distribution" is expanded by the addition of two provisions drawn from the commentary to the Model Act: namely that the term does not include compensation for services rendered or benefits conferred to further the corporation's purpose. It is further expanded by a third provision not found in the commentary: that compensation for property received by the corporation is not a "distribution."

The definition of "employee" is clarified, since the present Model Act definition (those who are employed) is circular.

The definition of "file" has been altered at the request of the Corporation Division to reflect the proposal's rejection of the Model Act concept of documents as effective on delivery. (See comment to ORS 65.051, Model Act § 2.03.)

The Model Act definition of "individual" has been completed to include the principal group intended.

The Model Act's definition of "member," although more restrictive than current Oregon law, was substantially retained in order to remedy prior ambiguity concerning what characteristics entitled a person to the statutory rights of "members." ORS 65.001(b)(B) adds the obviously intended result that power to *appoint* one or more directors does not, by itself, accord a person membership rights. ORS 65.001(22)(c) adds a reminder that membership rights can be eliminated by following the procedures spelled out elsewhere in the proposal.

The definition of "public benefit corporation" is reorganized for clarity and includes the criteria in Model Act § 17.07(3) and (4). Distribution to a religious corporation is permitted on dissolution. The definition includes all organizations exempt under section 501(c)(3) but also may include organizations that are exempt under other provisions, because some charitable organizations fail to qualify as 501(c)(3)'s because of lobbying activities.

"Record date" has been clarified to include changes proposed for ORS 60.001(18) by including a time reference and making explicit the duty to compile the list according to relevant rights of members.

The context for the definition of "secretary" has also been clarified to avoid confusion with references to the Secretary of State.

A new definition of uncompensated officer has been added to facilitate immunity provisions. See ORS 65.047(2)(c); see also ORS 65.369(4).

The Model Act's definitions of the three categories of nonprofit corporation (mutual benefit, public benefit, and religious) have been modified to directly incorporate material that the Model Act expresses through cross reference to Model Act Chapter 17.

(2) *Effective Changes from Chapter 61 Provisions*: Lead-in language has been added in recognition that some terms are given special definitions for purposes of limited sections.

Definitions for the three new categories of nonprofit corporation are added, as are definitions for "approved by members," "class," "contact address" (see comment 1), "delegates," "deliver," "directors," "distribution," "effective date of notice," "employee," "entity," "file," "governmental subdivision," "includes," "individual," "means," "membership," "notice," "office," "person," "principal

office,” “proceeding,” “record date,” “secretary,” “state,” “uncompensated officer,” “United States,” “vote,” and “voting power.”

The definition of “approval by” adds less restrictive requirements for membership votes. ORS 61.115 presently provides that a vote of a majority of the votes present and *entitled* to vote (but not necessarily actually voting) constitutes effective action if a quorum is present; there is no provision for requiring a supermajority. The portion of the Model Act provisions calculating majority on those *actually* voting was accepted as preferable to avoid allowing abstentions to preclude action. See also discussion in (1) *supra* regarding changes in the definition of “member” for purposes of statutory rights.

The definition of “articles” is expanded to include corrections. The definition of “bylaws” is restated to exclude the articles to conform to common expectation.

The definition of “foreign corporation” has been expanded to reach entities which would be classified as nonprofit corporations in this state, regardless of how they are classified in their home states.

Under current law, the concept of “members” is somewhat confused. Directors of corporations with members are not necessarily elected by the members. See ORS 61.111 (“where directors . . . are to be elected by members . . .”), 61.127(1) (“the members entitled to vote at an election of directors”), 61.111(3). Although ORS 61.091 states that any voting rights of members must be specified in the articles of incorporation, existing law does not clarify what the function of nonvoting members is intended to be nor whether one can be a member if he has certain voting rights but lacks the power to elect the board of directors. In addition, colloquially and in corporate documents, the term “member” may be used to designate persons with widely varying relationships to the organization including groups as large as all participants in a religious order, all local business interests, all local community members, all cash contributors, or all service providers. Under existing law, all appear to have some protections if their organization chooses to designate them as some form of members. The proposed statutory definition of “member” is more precise by limiting the term “member” for purposes of gaining the benefits of the Act to those persons who can vote for a director or directors on more than one occasion. The exclusion of those who vote on only one occasion or who have only

a right to designate or appoint (but not vote for) directors is intended to prevent membership protections and rights from accruing to delegates and those who act in *ex officio*, not personal capacities.

“Nonprofit corporation” has been redefined to accommodate the Model Act’s tripartite structure.

(3) *Relationship to the Oregon Business Corporation Act*: The lead-in language has been modified in recognition that some terms have special definitions for purposes of stated sections only.

The ORS 60.001(2) definition of “articles” does not include corrections thereof.

A potential leap-year problem in ORS 60.001(1)’s definition of “anniversary” has also been corrected by treating February 29 events as if they occurred on February 28.

The definition of “distribution” in this proposal also differs from that in ORS Chapter 60, which does not encompass transfers to directors, officers, and members and only limits transfer “in respect of any of its shares”—a concept inapplicable in this Act. The Business Corporation Act also automatically assumes officers are employees, but not directors; the Nonprofit proposal does not include them as employees unless they are compensated for non-board duties, because in nonprofit corporations officers are often unpaid volunteers; they often also make up the board.

The term “corporation sole” which is in this proposal is not *explicitly* included in the definition of “entity” in Chapter 60, but was added in the proposal for clarity.

The cross reference in the proposed definition of “individual” to the guardian of an incompetent is also not found in ORS 60.001(12), presumably an oversight.

Proposals for technical correction of ORS 60.001(18) concerning “record date” are picked up in this proposal.

The concept of “voting power” is used in the proposal in lieu of the Business Corporation Act’s concept of “voting group.”

New definitions, not found in the Business Corporation Act, have been added for “approval by members,” “board,” “bylaws,” “class,” “contact address,” “delegates,” “deliver,” directors,” “effective date of notice,” “file,” “member,” “membership,” “mutual benefit corporation,” “notice,” public benefit corporation,” “religious corporation,” “secretary,” “uncompensated officer,” and “vote.”

OFFICIAL COMMENT TO 1991 LEGISLATIVE AMENDMENT

The changes in (22)(a) are designed to avoid circularity and to limit the defining characteristic of members to their right to vote on election of directors. This definition is similar to the Model Act. Corresponding changes are made to ORS 65.227(1), below. The addition to (22)(b), derived from the California statute, clarifies that one does not become a member merely by virtue of rights as a lender.

(FILING DOCUMENTS)

65.004 FILING REQUIREMENTS

(1) A document must satisfy the requirements of this section, except as any other provision of this chapter modifies these requirements, to be entitled to filing by the Secretary of State under authority of this chapter.

(2) The document must be one required or permitted to be filed in the Office of the Secretary of State.

(3) The document shall contain the information required by this chapter. It may contain other information as well.

(4) The document must be legible.

(5) The document must be written in the alphabet used to write the English language, but may include Arabic or Roman numerals and incidental punctuation. The certificate of existence required of foreign corporations need not be in English if accompanied by a reasonably authenticated English translation.

(6) The document must be executed:

(a) By a fiduciary, receiver or trustee, if the corporation is in the hands of a receiver, trustee or other court-appointed fiduciary;

(b) By an incorporator, if directors have not been selected or its execution is before the organizational meeting;

(c) By the person specified in any section of this chapter that required the document be filed; or

(d) By the chairman of the board of directors of a domestic or foreign corporation, its president or otherwise by another of its officers.

(7) The document shall state beneath or opposite the signature the name of the person and the capacity in which the person signs. The document may, but is not required to, contain:

(a) The corporate seal;

(b) An attestation by the secretary or an assistant secretary; or

(c) An acknowledgment, verification or proof.

(8) If the Secretary of State has prescribed a mandatory form for a document under ORS 65.016, the document must be in or on the prescribed form.

(9) The document must be delivered to the Office of the Secretary of State for filing and must be accompanied by one exact or conformed copy, except as provided in ORS 65.114, 65.671, 65.674, 65.724 and 65.787, and the correct filing fee.

(10) A document is deemed filed or effective only as provided in ORS 56.080, 65.001, 65.011, 65.014 and 65.017.

OFFICIAL COMMENT TO ORS 65.004 (MODEL ACT § 1.20)

(1) *Proposed Changes to the Model Act*: Numerous changes in wording have been made to conform the Model Act to ORS Chapter 60. In addition, semantic changes are proposed for subsection (1) to recognize that the stated restrictions are not intended to preclude the Secretary's action in accordance with other relevant authority that might be granted outside this Act. The wording of subsection (5) has also been conformed to relevant language from ORS 65.094 (concerning the use of English language in statement of the corporate name). The proposal deviates from the language of both the Model Act and ORS 60.004(2) by deleting the explicit requirement that "*This Act* must require or permit filing," in order to avoid any possible inference that there must be an explicit mention of the document by title for it to be eligible to be filed.

The Model Act also requires *all* documents to be typed or printed; both ORS Chapters 60 and 61 presently permit use of legible handwritten documents. The flexibility of the existing provisions was retained in light of the many documents that consist of simply complete forms.

A new subsection (10) has been added at the request of the Corporation Division to solve a circular definition of "filed" in the Model Act and to make it clear that a document is not legally "filed" by mere deposit with the Division but rather is "filed" only when it has been reviewed and accepted for filing by the Division.

Both Chapters 60 and 61 presently contain an additional paragraph in this section concerning what is effective "delivery." Since

this Act uses the defined term “filed” throughout (and it has been defined to require both receipt and acceptance by the Secretary), that term has been substituted and cross-referenced here in lieu of using either existing ORS 61.018(10) or ORS 60.004(10)’s “delivery” or the Model Act’s ambiguously defined term.

The final references in the Model Act to other taxes, penalties, etc., are deleted to conform to Chapter 60 and because Oregon presently has no such provisions.

(2) *Effective Changes from Chapter 61 Provisions:* The Model Act permits use of either “exact or conformed” copies instead of “true” copies, as required in existing ORS 61.018(9). The Model Act’s easing of the technical rule was accepted as desirable. The provisions in existing ORS 61.018(5) have also been clarified to permit use of Arabic and Roman numerals and incidental punctuation, despite the “English language” requirement, in order to conform to provisions of existing ORS 61.072 and ORS 60.094(3). *See also* comment (1).

(3) *Relationship to the Oregon Business Corporation Act:* Chapter 61 presently parallels existing ORS 60.004.

65.007 FILING, SERVICE AND COPYING FEES

(1) **The Secretary of State shall collect the following fees for documents delivered for filing:**

<i>Document</i>	<i>Fee</i>
(a) Articles of incorporation	\$20
(b) Application for reserved name	\$10
(c) Application for registered name	\$100
(d) Application for reinstatement following administrative dissolution	\$20
(e) Application of a foreign corporation for authority to transact business in this state	\$40
(f) Annual report of a domestic or foreign corporation	\$10
(g) Certificate of existence or authorization	\$10
(h) Amendments to articles of incorporation and authority	\$10
(i) Restated articles of incorporation	\$10

(j) Mergers	\$10
(k) Dissolutions and withdrawals	\$10
(L) Change of registered agent or office	\$10
(m) Registered agent resignations	\$10
(n) Correction of annual report	\$10

(2) **The Secretary of State shall collect a fee of \$20 each time process is served on the Secretary of State under this chapter.**

(3) **The Secretary of State by rule may establish fees, in addition to those provided in subsections (1) and (2) of this section, for:**

(a) **Copying any public record maintained by the Office of Secretary of State and relating to a domestic or foreign corporation, and for certifying the copy.**

(b) **Certifying to facts of record, pursuant to ORS 65.027. [1989 c.1010 §§ 5, 5a; 1991 c.132 § 5]**

OFFICIAL COMMENT TO ORS 65.007 (MODEL ACT § 1.22)

(1) *Proposed Changes to the Model Act:* The Model Act language has been rejected in favor of conformity to existing ORS Chapter 60, resulting in the deletion of many Model Act fees for many documents, including the Model Act’s “catchall” fee. (The use of Chapter 60 language allows fees for other kinds of copying and certifying to be set by rule rather than the statute.)

(2) *Effective Changes from Chapter 61 Provisions:* The addition of fees for: reinstatement following administrative dissolution, amendments to articles of incorporation, restated articles of incorporation, and mergers and share exchanges. The words “application for” before “certificate of existence” were deleted.

(3) *Relationship to the Oregon Business Corporation Act:* Proposed provisions are parallel to ORS 60.007 except that the fees for filing articles, applications of foreign corporations for authority to do business, and annual reports are lower for nonprofits (as they are in existing law), and item (d) (concerning reinstatement) is not expressly limited to domestic corporations, as is the parallel provision in ORS 60.007. The fee levels included in this section are those recommended by the Corporation Division. The Task Force expresses no position on their appropriateness.

65.011 EFFECTIVE TIME AND DATE OF DOCUMENT

(1) Except as provided in subsection (2) of this section, ORS 56.080 and 65.014, a document accepted for filing after review is effective:

(a) On the date it is filed by the Secretary of State; and

(b) At the time, if any, specified in the document as its effective time or at 12:01 a.m. on that date if no effective time is specified.

(2) If a document specifies a delayed effective time and date, the document becomes effective at the time and date specified. If a document specifies a delayed effective date but no time, the document becomes effective at 12:01 a.m. on that date. A delayed effective date for a document may not be later than the 90th day after the date it is filed. [1989 c.1010 § 6]

OFFICIAL COMMENT TO ORS 65.011 (MODEL ACT § 1.23)

(1) *Proposed Changes to the Model Act:* The language of the Model Act is revised to conform to Chapter 60. The concept of a document as effective when first received at the Secretary of State's office (regardless of whether it is found to be acceptable on later review) is rejected as unworkable and inconsistent with ORS Chapter 60. The Model Act's "default" provision for the delayed effective time when one is not explicitly specified, has been changed from the *end* of the day to its beginning to limit the risk of inadvertent pre-incorporation acts.

(2) *Effective Changes from Chapter 61 Provisions:* None, except clarification of the effective time when one is not specified but a delayed date is specified.

(3) *Relationship to the Oregon Business Corporation Act:* This section picks up the proposed clarification of existing ORS 60.011(1) and (2) concerning the effective time when only a delayed date is specified and is otherwise identical to ORS 60.011, except for editorial insertion of the words "after review" in (1) for further assistance to lay users of the Act.

65.014 CORRECTING FILED DOCUMENT

(1) A domestic or foreign corporation may correct a document filed by the Secretary of State other than an annual report, if the document:

(a) Contains an incorrect statement; or

(b) Was defectively executed, attested, sealed, verified or acknowledged.

(2) Errors in annual reports may be corrected as provided in ORS 65.787.

(3) A domestic or foreign corporation seeking to correct a document shall deliver the articles of correction to the Office of the Secretary of State for filing. The articles shall include the following:

(a) A description of the incorrect document, including its filing date or a copy of the document;

(b) A description of the incorrect statement and the reason it is incorrect or a description of the manner in which the execution, attestation, seal, verification or acknowledgment is defective; and

(c) A correction of the incorrect statement or defective execution, attestation, seal, verification or acknowledgment.

(4) Articles of correction are effective on the effective date of the document they correct except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, articles of correction are effective when filed by the Secretary of State.

(5) An incorrect document with a delayed effective date may also be corrected by withdrawal and new filing pursuant to the provisions of ORS 56.080. [1989 c.1010 § 7]

OFFICIAL COMMENT TO ORS 65.014 (MODEL ACT § 1.24)

(1) *Proposed Changes to the Model Act:* The Model Act's language has been revised to conform to ORS Chapter 60, without substantive change except that: (1) annual reports are excluded from operation of this section due to separate coverage elsewhere; (b) correction of problems in attestation, seal, verification and acknowledgment are explicitly permitted; and (c) reference to use of withdrawal as a means to correct an error has been inserted.

(2) *Effective Changes from Chapter 61 Provisions:* None, except addition of a cross-reference to withdrawal of documents under ORS 56.080 as a means to correct an error.

(3) *Relationship to the Oregon Business Corporation Act:* Provisions are parallel to ORS 60.014, with the exception of cross-reference to the special correction procedures for annual reports, addition of clarifying language to help lay users avoid erroneous

assumptions about when a document is "filed," and the cross-reference on withdrawal noted in comment (2).

65.016 FORMS

- (1) Upon request, the Secretary of State shall furnish forms for:
 - (a) A foreign corporation's application for authority to transact business in this state;
 - (b) A foreign corporation's application for withdrawal; and
 - (c) An annual report.
- (2) The Secretary of State may by rule require the use of the forms listed under subsection (1) of this section.
- (3) Upon request, the Secretary of State shall furnish forms for other documents required or permitted to be filed by this chapter. Use of such forms is not required. [1989 c.1010 § 4]

OFFICIAL COMMENT TO ORS 65.016 (MODEL ACT § 1.21)

- (1) *Proposed Changes to the Model Act*: The Model Act language was edited to conform to existing ORS Chapter 60, without substantive change.
- (2) *Effective Changes from Chapter 61 Provisions*: None.
- (3) *Relationship to the Oregon Business Corporation Act*: Identical to ORS 60.016.

65.017 FILING DUTY OF SECRETARY OF STATE

- (1) If a document delivered to the Office of the Secretary of State for filing satisfies the requirements of ORS 65.004, the Secretary of State shall file it.
- (2) The Secretary of State files a document by indicating thereon that it has been filed by the Secretary of State and the date of filing. The time of filing shall be deemed to be 12:01 a.m. on that date. After filing a document, except those referred to in ORS 65.114, 65.671, 65.674, 65.724 and 65.787, the Secretary of State shall return a copy to the domestic or foreign corporation or its representative.
- (3) If the Secretary of State refuses to file a document, the Secretary of State shall return it to the domestic or foreign corporation or its representative within 10 business days after the document was received by the Office of the Secretary of State, together with a brief written explanation of the reason or reasons for the refusal.

(4) The Secretary of State's duty to file documents under this section is ministerial. The Secretary of State is not required to verify or inquire into the legality or truth of any matter included in any document delivered to the Office of the Secretary of State for filing. Except as provided elsewhere in this chapter, the Secretary of State's filing or refusing to file a document does not:

- (a) Affect the validity or invalidity of the document in whole or in part except as provided in ORS 65.051; or
- (b) Relate to the correctness or incorrectness of information contained in the document.

(5) The Secretary of State's refusal to file a document does not create a presumption that the document is invalid or that information contained in the document is incorrect. [1989 c.1010 § 8]

OFFICIAL COMMENT TO ORS 65.017 (MODEL ACT § 1.25)

(1) *Proposed Changes to the Model Act*: Model Act language has been revised to conform to ORS Chapter 60 and its proposed revisions. Accordingly, (a) the time to reject a document has been lengthened from five days to ten business days; (b) the Model Act concept of "effective upon deposit" is rejected in favor of an "effective upon review and filing" standard; (c) the numerous Oregon statutory provisions which are exceptions to the duty to return a copy to the originator are cross-referenced; and (d) an additional sentence explicitly limiting the Secretary's duty of inquiry has been added.

In addition to those changes to conform to ORS Chapter 60, the proposal also corrects a potentially misleading statement in Model Act § 1.25(d)(3), which implies that filing or rejection never creates any presumptions concerning validity of stated facts. ORS 65.024(2) *does* make filing "prima facie evidence" of all facts required to be included in the document so that effect has been cross-referenced.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal eliminates reference to the returned copy as a "true" copy, since conformed copies are acceptable for this purpose under this Act. In addition, since an effective *time* of filing is referred to in other sections, a presumed "time" is also supplied in this provision both to avoid the need for the Secretary to time-stamp all documents upon filing, and to decrease the risk of inadvertent pre-incorporation ac-

tivity. The proposal also corrects ORS 61.034's misleading flat statement that filing creates *no* presumptions of validity of correctness of stated information. ORS 65.024 in fact makes the filed document "prima facie evidence" of all facts required to be included.

(3) *Relationship to the Oregon Business Corporation Act*: This section parallels ORS 60.017 except by deleting the word "true" with respect to the copy and the addition of a cross-reference to ORS 65.051. The changes are clarifications rather than alterations of substance. Subsection (4) picks up the proposed revision of ORS 60.017 by deleting reference to mandatory rule-making by the Secretary of State, a change requested by the Corporation Division.

65.021 APPEAL FROM SECRETARY OF STATE'S REFUSAL TO FILE DOCUMENT

If the Secretary of State refuses to file a document delivered to the Office of Secretary of State for filing, the domestic or foreign corporation, in addition to any other legal remedy which may be available, shall have the right to appeal from such final order pursuant to the provisions of ORS 183.484. [1989 c.1010 § 9]

OFFICIAL COMMENT TO ORS 65.021 (MODEL ACT § 1.26)

(1) *Proposed Changes to the Model Act*: The Model Act language has been revised to parallel ORS Chapter 60, deleting jurisdictional and procedural matters which are covered in general administrative appeal materials in ORS Chapter 183. ORS 183.484 of that chapter places jurisdiction of noncontested case orders in Marion County or the county where the petitioner "resides or has a principal business office," and only requires a statement of how one is aggrieved by the order challenged (not attachment of the Secretary's explanation, as provided in the Model Act). The cross-referenced chapter or ORS also sets forth the limits of court review (to set aside an order if a different action is compelled by proper interpretation of the law and to remand for abuse of discretion) but, unlike the Model Act, does not provide *explicitly* for summary orders. While the Task Force agrees with the Model Act drafters that summary orders are desirable in most appeals of ministerial acts under the Act, it was not felt to be desirable to create special procedural rules not applicable to all actions under the state Administrative Procedures Act. It is hoped that application of the

Administrative Procedures Act will achieve expeditious determinations.

ORS Chapter 183 provides for further appeal in such matters "as provided for appeals from the circuit court in suits in equity" - *i.e.*, is more specific on the standard of review than the Model Act. It also has a provision (ORS 183.486(1)(b)) for "ancillary relief the court finds necessary to redress the effects of official action wrongfully taken or withheld," but not one as broad as the Model Act's § 1.26(b). Here too it was deemed preferable to address any needed changes in the Administrative Procedures Act by direct revision of its provisions and not by inserting new provisions in this Act.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal parallels current ORS Chapter 61.037 except by using a more precise cross-reference to Chapter 183 in order to resolve potential issues of whether a Secretary's refusal to file a document is a "final order" or leads to "contested case" proceedings. Because the duty is ministerial, an evidentiary hearing at the administrative level was not felt to be useful, so an explicit "final order" approach was used.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal parallels ORS 60.021, except with respect to the more precise cross-reference to the provisions of ORS Chapter 183. See comment (2).

65.024 EVIDENTIARY EFFECT OF CERTIFIED COPY OF FILED DOCUMENT OR SECRETARY'S CERTIFICATE

(1) **A certificate bearing the Secretary of State's signature, which may be in facsimile, and attached to a copy of a document is conclusive evidence that the original document or a facsimile thereof is on file with the Office of the Secretary of State.**

(2) **The following shall be received in all courts, public offices and official bodies of this state as prima facie evidence of the facts stated therein, unless a greater evidentiary effect is provided in ORS 65.027 and 65.051 or elsewhere in this chapter or it is shown that the document was thereafter corrected or withdrawn from the files of the Office of the Secretary of State:**

(a) **All facts stated in certificates issued by the Office of the Secretary of State with respect to its business registry functions including a certificate of compliance or noncompliance of a document with filing requirements or other provisions of law administered by**

the Office of the Secretary of State, or a certificate as to the existence or nonexistence of facts which would appear from presence or absence of documents in the files of the Office of the Secretary of State; and

(b) All facts stated in documents certified as filed by the Office of the Secretary of State, but only to the extent the specific items were required to be included in the document by this chapter or ORS chapter 61 (1987 Replacement Part). [1989 c.1010 § 10]

OFFICIAL COMMENT TO ORS 65.024 (MODEL ACT § 1.27)

(1) *Changes to the Model Act*: The Model Act language has been changed to follow ORS Chapter 60. The title and content of this section are expanded to set out the evidentiary effects found in ORS 56.110 concerning certificates other than certification of filing. A qualification concerning the effect of documents withdrawn under ORS 56.080 also was added.

(2) *Effective Changes from Chapter 61 Provisions*: None; the proposal parallels existing ORS 61.041(1) except for deletion of the qualifying phrase “filed by the Secretary of State,” a requirement which is somewhat circular when the object of the certificate is to prove that the document has been filed. The title has also been corrected to reflect both of the subjects covered in the section. ORS 61.041(2)’s wholesale incorporation of ORS 56.100 (which in turn gives prima facie evidentiary effect to *all* “facts” in a filed document) has been deleted as inconsistent with ORS 65.017 and ORS 65.051, Model Act §§ 1.25 and 2.03. (Those sections limit the reviewing function of the Secretary, and expressly disclaim any presumption of correctness of any fact stated in a document other than required facts.)

ORS 56.110 also clearly conflicts with both existing for-profit and nonprofit corporation law (ORS 60.024(1) and ORS 61.041(1)) as well as this section and ORS 65.027, Model Act § 1.28, insofar as it provides that a certificate issued by the Secretary presumably including certification that a document is on file and a certificate of existence or authorization is only “prima facie evidence of the facts stated in the certificate.” Both this proposal and existing provisions in both ORS Chapters 60 and 61 provide for *conclusive* effect for some certificates. It is the drafters’ intent that the provisions of this Act prevail over the generalities of ORS 56.110.

To the extent it gives prima facie evidentiary effect to *required* contents of a document or conditions precedent to filing, the provisions of ORS 56.110 have been retained but are restructured to coordinate them with other relevant provisions and are modified to deal with the logical effects of “corrected” documents.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal parallels ORS 60.024 except as noted in comment (2) above, with respect to ORS 56.110.

65.027 CERTIFICATE OF EXISTENCE OR AUTHORIZATION

(1) Anyone may apply to the Office of the Secretary of State to furnish a certificate of existence for a domestic corporation or a certificate of authorization for a foreign corporation.

(2) A certificate of existence or authorization, when issued, means that:

(a) The domestic corporation’s corporate name or the foreign corporation’s corporate name is of active record in this state;

(b) The domestic corporation is duly incorporated under the law of this state or the foreign corporation is authorized to transact business in this state;

(c) All fees payable to the Secretary of State under this chapter have been paid, if nonpayment affects the existence or authorization of the domestic or foreign corporation;

(d) An annual report if required by ORS 65.787 has been filed by the Secretary of State within the preceding 14 months; and

(e) Articles of dissolution or an application for withdrawal have not been filed by the Secretary of State.

(3) A person may apply to the Secretary of State to issue a certificate covering any fact of record.

(4) Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the Secretary of State may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business in this state. [1989 c.1010 § 11]

OFFICIAL COMMENT TO ORS 65.027 (MODEL ACT § 1.28)

(1) *Proposed Changes to the Model Act*: The Model Act language has been rejected in favor of the language now used in both ORS Chapters 60 and 61. Those changes extend the scope of this

provision to cover the effect of the relevant certificate as to foreign corporations (certificate of authorization), give the certificate the effect of proving the corporate name is of record, eliminate the need to state the date of incorporation and dates of duration (unless specifically requested), delete assurances concerning taxes and penalties and other payments not managed by the Secretary of State in this state, give assurances that no application for withdrawal is on file, and link the assurances of an annual report to the Oregon filing period.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal follows ORS 61.044 except for: (a) correction of ORS 61.044(2)(a)'s inaccurate use of the word "registered" to refer to the fact that a domestic or authorized foreign corporation's name is of record in this state ("registered" is used in ORS 65.101, Model Act § 4.03, to describe recording of the name of companies *not* organized or doing business in Oregon); and (b) recognition that a corporation may not yet have had a duty to file an annual report.

(3) *Relationship to the Oregon Business Corporation Act*: Parallels ORS 60.027 except as noted in comment (2).

(SECRETARY OF STATE)

65.031 POWERS

The Secretary of State has the power reasonably necessary to perform the duties required of the Office of the Secretary of State by this chapter. [1989 c.1010 § 13]

OFFICIAL COMMENT TO ORS 65.031 (MODEL ACT § 1.30)

(1) *Proposed Changes to the Model Act*: The title of this section has been amplified to distinguish it from sections on *corporate* powers, without other change.

(2) *Effective Changes from Chapter 61 Provisions*: The wording of ORS Chapter 60 has been substituted for the existing provision for consistency, without substantive change.

(3) *Relationship to the Oregon Business Corporation Act*: The provision is identical to ORS 60.031 except for an editorial correction so that the reference is to duties of the Secretary of State's *office*, rather than just the Secretary *per se*.

(NOTICE)

65.034 NOTICE

(1) Notice may be oral or written unless otherwise specified for a particular kind of notice.

(2) Notice may be communicated in person, by telephone, telegraph, teletype or other form of wire or wireless communication, or by mail or private carrier, including publication in a newsletter or similar document mailed to a member's or director's address. If these forms of personal notice are impracticable, notice may be communicated by a newspaper of general circulation in the area where the meeting is to be held, or by radio, television or other form of public broadcast communication.

(3) Written notice by a domestic or foreign corporation to its member, if in a comprehensible form, is effective when mailed if it is mailed postpaid and is correctly addressed to the member's address shown in the corporation's current records of members.

(4) Oral notice is effective when communicated if communicated in a comprehensible manner.

(5) Except as provided in subsection (3) of this section, personal written notice, if in a comprehensible form, is effective at the earliest of the following:

(a) When received;

(b) Five days after its postmark, if mailed by United States mail correctly addressed and with first class postage affixed;

(c) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee;

(d) Thirty days after its deposit in the United States mail if mailed correctly addressed and with other than first class, registered or certified postage affixed; or

(e) The date specified by the articles of incorporation or bylaws with respect to notice to directors.

(6)(a) Written notice is correctly addressed to a member of a domestic or foreign corporation if addressed to the member's address shown in the corporation's current list of members.

(b) A written notice or report delivered as part of a newsletter, magazine or other publication sent to members shall constitute a written notice or report if addressed or delivered to the member's

address shown in the corporation's current list of members, or in the case of members who are residents of the same household and who have the same address in the corporation's current list of members, if addressed or delivered to one of such members, at the address appearing on the current list of members.

(c) Written notice is correctly addressed to a domestic or foreign corporation authorized to transact business in this state, other than in its capacity as a member, if addressed to its registered agent or, if none is of record, to its principal office shown in its most recent annual report or, if none, in the articles of incorporation or its application for a certificate of authority to do business.

(7) If ORS 65.214 or any other provision of this chapter prescribes different notice requirements for particular circumstances, those requirements govern. If articles or bylaws prescribe different notice requirements, not less stringent than the provisions of this section or other provisions of this chapter, those requirements govern. [1989 c.1010 § 15]

OFFICIAL COMMENT TO ORS 65.034 (MODEL ACT § 1.41)

(1) *Proposed Changes to the Model Act*: Subsection (2) revises subsection (b) of the Model Act in order to be consistent with the publication provisions of ORS 65.034(6)(b) and so that the requirement of a paper of "general circulation" is meaningfully related to its notice function. The "mailbox rule" corresponding to ORS 60.034(3)'s provisions for notice to shareholders was substituted, as ORS 65.034(3), for the more stringent Model Act requirements for notice to members when personal notice is given, but not when bulk mailing or newsletters are used for notice. A confusing and superfluous reference to "deposit" is removed from ORS 65.034(5).

The provisions of ORS 65.034(5)(d) modify the Model Act since bulk mailing by permit (frequently used by nonprofits) does not ordinarily produce a postmark. The requirement that a newsletter be one "regularly sent" was deleted from ORS 65.034(6)(b) because it was felt to serve no purpose. Model Act subsection (g), ORS 65.034(6)(c), was revised to address the problem of nonprofits that do not designate a registered agent or have a real office. Model Act subsection (h), ORS 65.034(7), is revised to remove the inappropriate term "inconsistent with." See comment (3).

(2) *Effective Changes from Chapter 61 Provisions*: The present

statute (ORS 61.105) lacks provisions on giving notice to full members by means other than individual notice mailed with first class postage and also lacks provisions on calculation of effective dates when other means of notice are used. Existing provisions in ORS 61.105(2) and (3) for less formal forms of notice to limited classes of members are extended to broader groups. The "mailbox rule" for the effective date of individual notice in ORS 61.105(1) is retained.

(3) *Relationship to the Oregon Business Corporation Act*: ORS 60.034(1) establishes written notice as the general rule for business corporations. The Nonprofit Corporation Act proposal sanctions oral notice unless it is specifically prohibited for a particular activity. Subsection (2) has been expanded beyond the provisions of its corollary (ORS 60.034(2)) to coordinate it with publication provisions included in subsection (6) of the proposal. ORS 60.034(3) requires all notices to shareholders to be in writing but makes such notice effective upon mailing. In contrast, the proposal allows more casual forms of communication to nonprofit "members," and follows the more restrictive rules for calculating the effective date when those methods are used. ORS 60.034(3)'s provision of the "mailbox rule" when individual notice is given to shareholders is retained for members as well.

Subsection (5) of the proposal follows ORS 60.034(5) but distinguishes published written notice and use of non-first class publications (which are often used for nonprofits but not by business corporations). It eliminates the superfluous and confusing reference to deposit date, since the postmark should control, and clarifies that it applies only to regular U.S. mail service.

A proposed change to ORS 60.034(5) permitting articles or bylaws to set alternate shorter periods for effective notice to directors has also been incorporated in this proposal for the Nonprofit Act. Subsection (6) (concerning how to address a notice) parallels ORS 60.034(3) but has additional provisions for publication, which was not authorized for business corporations. Subsection (7) parallels ORS 60.034(7) but the language has been changed to clarify the vague term "not inconsistent with." (Since the point of the provision is to resolve issues of primacy of *different* provisions contained in other documents, those provisions will *always* be "inconsistent with" these provisions: there would be no need for the provision otherwise.)

(PRIVATE FOUNDATIONS)

65.036 PRIVATE FOUNDATIONS

Except where otherwise determined by a court of competent jurisdiction, a corporation which is a private foundation as defined in section 509 of the Internal Revenue Code of 1986 shall:

- (1) Distribute such amounts for each taxable year at such time and in such manner as not to subject the corporation to tax under section 4942 of the Internal Revenue Code of 1986;
- (2) Not engage in any act of self-dealing as defined in section 4941(d) of the Internal Revenue Code of 1986;
- (3) Not retain any excess business holdings as defined in section 4943(c) of the Internal Revenue Code of 1986;
- (4) Not make any investments in such a manner as to subject the corporation to taxes on investments which jeopardize charitable purposes as provided in section 4944 of the Internal Revenue Code of 1986; and
- (5) Not make any taxable expenditures as defined in section 4945(d) of the Internal Revenue Code of 1986. [1989 c.1010 § 16]

OFFICIAL COMMENT TO ORS 65.036 (MODEL ACT § 1.50)

(1) *Proposed Changes to the Model Act:* The "Code" is more accurately defined as the 1986 version. Subsection (4) is added to parallel Internal Revenue Code provisions and those of existing ORS 61.955. The Model Act's clause incorporating unspecified future amendments of the Code was deleted because of concern it would constitute an unconstitutional delegation of legislative authority under the Oregon Constitution.

(2) *Effective Changes from Chapter 61 Provisions:* See (1) immediately above.

(3) *Relationship to the Oregon Business Corporation Act:* No relevant section.

(JUDICIAL RELIEF)

65.038 JUDICIAL RELIEF

(1) If for any reason it is impractical or impossible for any corporation to call or conduct a meeting of its members, delegates or directors, or otherwise obtain their consent in the manner prescribed by its articles, bylaws or this chapter, then upon petition of

a director, officer, delegate, member or the Attorney General, the circuit court for the State of Oregon for the county in which the principal office designated on the last filed annual report, articles or application for authority to transact business is located, or if none, within Oregon, Marion County, may order that such a meeting be called. The court may also order that a written ballot or other form of obtaining the vote of members, delegates or directors be authorized, in such a manner as the court finds fair and equitable under the circumstances.

(2) The court shall, in an order issued pursuant to this section, provide for a method of notice reasonably designed to give actual notice to all persons who would be entitled to notice of a meeting held pursuant to the articles, bylaws and this chapter, whether or not the method results in actual notice to all such persons or conforms to the notice requirements that would otherwise apply. In a proceeding under this section, the court may determine who are the members or directors.

(3) The order issued pursuant to this section may for good cause shown dispense with any requirement relating to the holding of or voting at meetings or obtaining votes, including any requirement that would otherwise be imposed by the articles, bylaws or this chapter as to quorum or as to the number or percentage of votes needed for approval of an act.

(4) Whenever practical, any order issued pursuant to this section shall limit the subject matter of meetings or other forms of consent judicially authorized to those items, including amendments to the articles or bylaws, the resolution of which will or may enable the corporation to continue managing its affairs without further resort to this section. An order under this section may also authorize the obtaining of whatever votes and approvals are necessary for the dissolution, merger or sale of assets.

(5) Any meeting or other method of obtaining the vote of members, delegates or directors conducted pursuant to an order issued under this section, and which complies with all the provisions of such order, is for all purposes a valid meeting or vote, as the case may be, and shall have the same force and effect as if it complied with every requirement imposed by the articles, bylaws and this chapter. [1989 c.1010 § 17]

OFFICIAL COMMENT TO ORS 65.038 (MODEL ACT § 1.60)

(1) *Proposed Changes to the Model Act*: The county where judicial relief can be obtained has been specified and a “good cause” standard explicitly required in (3) as justification for deviation from otherwise applicable requirements.

(2) *Effective Changes from Chapter 61 Provisions*: There are no explicit existing provisions on this subject, but the proposal conforms with general principles of equity.

(3) *Relationship to the Oregon Business Corporation Act*: ORS 60.207 provides a means for a court to order meetings and make related findings on entitlement to notice, vote, etc., but only if the annual meeting was not timely held or the officers refused to give notice of a shareholder-triggered special meeting. Under its provisions, only aggrieved shareholders can institute such proceedings. There is a presumption in Chapter 60—not always appropriate in a nonprofit context—that the corporation can always figure out who its shareholders are, give them effective notice and achieve a quorum if it wants to.

ORS 60.661 provides means to deal with deadlocks once a meeting is called. That subject is covered in ORS 65.661.

(ATTORNEY GENERAL)

65.040 NOTICE TO ATTORNEY GENERAL; EFFECT OF FAILURE TO NOTIFY

(1) The Attorney General shall be given notice of the commencement of any proceeding which ORS 65.038, 65.084, 65.207, 65.327, 65.661 or 65.751 or any other provision of this chapter authorize the Attorney General to bring but which has been commenced by another person.

(2) Whenever any provision of this chapter requires that notice be given to the Attorney General before or after commencing a proceeding or permits the Attorney General to commence a proceeding:

(a) If no proceeding has been commenced, the Attorney General may take appropriate action including, but not limited to, seeking injunctive relief; or

(b) If a proceeding has been commenced by a person other than

the Attorney General, the Attorney General, as of right, may intervene in such proceeding. [1989 c.1010 § 18]

OFFICIAL COMMENT TO ORS 65.040 (MODEL ACT § 1.70)

(1) *Proposed Changes to the Model Act*: Cross-references are added.

(2) *Effective Changes from Chapter 61 Provisions*: The Attorney General is not assured by the existing statutory provisions of receiving notice of relevant litigation, and his explicit enforcement authority is limited to ORS 61.565 (conduct challenged in the course of actions seeking dissolution). In the proposal, the scope of the Attorney General’s powers is defined in other sections and encompasses power to seek an injunction.

(3) *Relationship to the Oregon Business Corporation Act*: ORS 60.661 provides the Attorney General a role in the event of corporate deadlock and dissolution. (The comparable provisions in this proposal are found in ORS 65.661, Model Act § 14.30.) ORS 60.661 has no provisions on notice to the Attorney General of relevant litigation nor does it accord him as broad a role as he is accorded with respect to nonprofit corporations in this proposal.

(RELIGIOUS CORPORATIONS)

65.042 RELIGIOUS CORPORATIONS; CONSTITUTIONAL PROTECTIONS

If religious doctrine or practice governing the affairs of a religious corporation is inconsistent with the provisions of this chapter on the same subject, the religious doctrine or practice shall control to the extent required by the Constitution of the United States or the Constitution of this state, or both. [1989 c.1010 § 19]

OFFICIAL COMMENT TO ORS 65.042 (MODEL ACT § 1.80)

(1) *Proposed Changes to the Model Act*: Addition of the phrase “or practice” since not all religious organization derives from “doctrine.”

(2) *Effective Changes from Chapter 61 Provisions*: This provision highlights constitutional rights which exist in case law but which are not explicit in existing statutes.

(3) *Relationship to the Oregon Business Corporation Act*: None.

INCORPORATION

65.044 INCORPORATORS

One or more individuals 18 years of age or older, a domestic or foreign corporation, a partnership or an association may act as incorporators of a corporation by delivering articles of incorporation to the Secretary of State for filing. [1989 c.1010 § 20]

OFFICIAL COMMENT TO ORS 65.044 (MODEL ACT § 2.01)

(1) *Proposed Changes to the Model Act:* Existing Oregon law requires incorporators to be 18 years old or older. The Model Act's permission for an individual of any age to act as an incorporator was rejected. While the Task Force recognized that such a provision might, on a rare occasion, serve to validate legitimate expectations when a technical error has been made, it did not wish to create larger problems by encouraging individuals with limited legal responsibility for their business acts to undertake steps that deserve serious and responsible action.

The Model Act's broad authorization to any "person" to serve as incorporator was rejected in favor of existing Business Corporation Act and ORS Chapter 61 provisions, which limit that role to individuals, corporations, partnerships and "associations."

(2) *Effective Changes from Chapter 61 Provisions:* This provision parallels ORS 61.305.

(3) *Relationship to the Oregon Business Corporation Act:* The proposal parallels ORS 60.044.

65.047 ARTICLES OF INCORPORATION

(1) The articles of incorporation formed pursuant to this chapter subsequent to October 3, 1989, shall set forth:

(a) A corporate name for the corporation that satisfies the requirements of ORS 65.094;

(b) One of the following statements or words of similar import:

(A) This corporation is a public benefit corporation;

(B) This corporation is a mutual benefit corporation; or

(C) This corporation is a religious corporation;

(c) The address, including street and number, of the corporation's initial registered office and the name of its initial registered agent at that location;

(d) The name and address of each incorporator;

(e) An alternate corporate mailing address which shall be that of the principal office, as defined in ORS 65.001, to which notices, as required by this chapter, may be mailed until the principal office of the corporation has been designated by the corporation in its annual report;

(f) Whether or not the corporation will have members as that term is defined in this chapter; and

(g) Provisions regarding the distribution of assets on dissolution.

(2) The articles of incorporation may set forth:

(a) The names and addresses of the initial directors;

(b) Provisions regarding:

(A) The purpose or purposes for which the corporation is organized;

(B) Managing and regulating the affairs of the corporation;

(C) Defining, limiting and regulating the powers of the corporation, its board of directors, and members or any class of members; and

(D) The characteristics, qualifications, rights, limitations and obligations attaching to each or any class of members;

(c) A provision eliminating or limiting the personal liability of a director or uncompensated officer to the corporation or its members for monetary damages for conduct as a director or officer, provided that no such provision shall eliminate or limit the liability of a director or officer for any act or omission occurring prior to the date when such provision becomes effective, and such provision shall not eliminate or limit the liability of a director or officer for:

(A) Any breach of the director's or officer's duty of loyalty to the corporation or its members;

(B) Acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law;

(C) Any unlawful distribution;

(D) Any transaction from which the director or officer derived an improper personal benefit; and

(E) Any act or omission in violation of ORS 65.361 to 65.367; and

(d) Any provision that under this chapter is required or permitted to be set forth in the bylaws.

(3) The incorporator or incorporators must sign the articles and before including the name of any individual as a director shall state that they have obtained the consent of each director named to serve.

(4) The articles of incorporation need not set forth any of the corporate powers enumerated in this chapter but may restrict them in order to meet federal tax code requirements or other purposes. [1989 c.1010 § 21]

OFFICIAL COMMENT TO ORS 65.047 (MODEL ACT § 2.02)

(1) *Proposed Changes to the Model Act:* A phrase has been added to subsection (1) to avoid any unintended inference that existing nonprofit corporations must redo their articles to include the new classifications. Language has been added from existing law and the Oregon Business Corporation Act, which require the mailing address of the “principal place of business” pending the annual report designation. Subsections (1)(c) and (1)(e) have been revised in accordance with the Corporation Division’s request for clarification of the relationship of the two requested addresses. The “principal business” address serves as an alternate and is particularly important if the registered agent resigns. *See* discussion in comments to ORS 65.117, Model Act § 5.03.

Where the word “member” is introduced in subsection (1)(f), its unique statutory definition is emphasized to avoid confusion with nonstatutory definitions. The authority of the Secretary of State to add additional requirements for identifying data has also been retained from the existing law.

The Model Act’s inclusion of the words “not inconsistent with law” has been rejected in provisions relating to “final distributions” and “provisions for management of corporate affairs,” both in order to parallel the Oregon Business Corporation Act and to give effect to the Model Act’s intent that the Secretary of State not have to make any judgment about the legality of provisions inserted in the articles. Note ORS 65.051, Model Act § 2.03, which make filing conclusive proof of satisfaction of all conditions precedent to incorporation. If the provisions on distribution must be “in conformance with the law” to permit filing, which in turn is necessary for incorporation, then filing would have the effect of establishing that the dissolution distribution provisions are legally permissible, absent

the suggested change. The Corporation Division is not in a position to make such a determination.

Subsection (4) adds language cuing lay users that they may not want to accept the default “all lawful powers” provision.

The Model Act’s alternative (concerning immunity for directors and officers) has been reworded in ORS 65.047(2)(c) for consistency with proposed changes to ORS 60.047 in the Oregon Business Corporation Act.

The Model Act requires that each incorporator and director named in the articles must sign them. That requirement can be burdensome when, as is common with nonprofit groups, such individuals may reside throughout the state (or outside the state). Since directors need not be named and a single person can act as incorporator, the burden can be readily avoided by a knowledgeable incorporator. It was the conclusion of the Task Force, however, that no useful purpose would be served by discouraging multiple incorporators since it would result in the official records not reflecting the identity of principals in new corporations until the first annual report is filed under ORS 65.787, Model Act § 16.22. The Task Force was also aware that many laymen forming nonprofit organizations are reluctant to take on the perceived responsibilities of being a sole incorporator. The only identified purpose of the Model Act requirement of actual signatures is to avoid the complications of unauthorized naming of celebrities and others as directors when they have not agreed to serve. A provision requiring the incorporators to affirmatively state that they have obtained consent of the named directors has been substituted in the proposal in lieu of their signatures. That requirement, plus the new penalties for presenting documents with false statements for filing, should be sufficient deterrent to prevent insertion of unauthorized names.

(2) *Effective Changes from Chapter 61 Provisions:* The existing law’s provision on perpetual duration (absent other provision in the articles) is provided elsewhere (ORS 65.077, Model Act § 3.02) and has been dropped from this section. Existing ORS 61.311(b) also requires an express statement of purposes in the articles but permits it to be “all lawful activities”; the proposal makes any statement of purpose optional since ORS 65.074, Model Act § 3.01, provides the necessary default provision.

The proposal also discontinues the existing requirement for state-

ment of the names and addresses of the initial directors as unnecessary in the articles. ORS 61.311(1)(e)'s provision for an interim mailing address other than that of the registered agent has been retained but clarified as requested by the Corporation Division to avoid provision of a single address for purposes of both ORS 65.047(1)(c) and (e) since the purpose of (e) is to provide an alternate address when the corporation is without a registered agent or cannot be reached by that means.

Semantic confusion in ORS 61.311 (which stated that the Articles "*shall* include . . . provisions the incorporators *elect* to set forth") has been eliminated and statements of the mechanisms for management of the affairs of the corporation have clearly been identified as optional. Unlike existing ORS 61.311, the proposal makes a statement of the provisions for distribution of assets upon dissolution mandatory, since that is a key factor in proper characterization of the organization in the new tripartite approach.

Existing ORS 61.311 requires the articles to specify how successor directors are selected (in more detail than a statement that there are or are not "members"). Under the proposal, those provisions may now be reserved for the bylaws. The decisions to permit transfer of this basic information about control of the organization to its bylaws, which are not public documents, parallels the handling of the issue under the Oregon Business Corporation Act; it also makes the provisions easier to change. At the request of the Corporation Division, the ORS 61.311(4) provision for the Secretary of State to expand mandatory identification data by rule has been deleted as superfluous.

Existing ORS 61.218, reenacted as ORS 65.369, immunizes uncompensated officers and directors for acts which are neither gross negligence nor "intentional acts"; it is self executing. In contrast, this section potentially extends immunity to a broader group (including all directors whether or not compensated) but it requires a provision in the articles to obtain the immunity. The immunity available under this section is also broader than ORS 65.369 and existing ORS 61.218 in that it covers even "gross negligence" if it is not a breach of loyalty, in bad faith, intentional misconduct, knowing violation of law, an unlawful distribution, an improper personal benefit or a violation of ORS 65.361, 65.364, 65.367 or Model Act §§ 8.31-8.33.

(3) *Relationship to the Oregon Business Corporation Act*: This section parallels the Oregon Business Corporation Act (ORS 60.047), deleting inappropriate provisions concerning number of shares and par value and adding corollary provisions concerning members, distribution on dissolution, and the tripartite grouping of nonprofit corporations. Technical changes requested by the Corporation Division clarifying the relationship between the addresses requested for the registered agent and as an interim alternate mailing address have been implemented here despite the fact they were not accepted by the revisors of the Business Corporation Act for ORS 60.047. A laymen's "cue" regarding possible reasons to include optional restrictions on corporate powers in the nonprofit context and a requirement of an explicit representation of consent to serve by named directors have been added to address problems created by the frequency with which inexperienced individuals perform the corporate organizational steps for nonprofits.

The Business Corporation Act's immunity for unlawful distributions has been expanded to exclude any conduct wrongful under ORS 65.361, 65.364, 65.367 or Model Act §§ 8.31-8.33, which deal with not only unlawful distributions but also conflicts of interest and loans to directors and officers. *See* comments to ORS 65.357, Model Act § 8.30. Because a nonprofit corporation's group of directors is often synonymous with its uncompensated officers, an authorization for identical immunity in that capacity is included in order to prevent the immunized conduct from being attacked under the guise of the alternate title.

65.051 INCORPORATION

(1) **Unless a delayed effective date is specified, the corporate existence begins when the articles of incorporation are reviewed, accepted and filed by the Secretary of State.**

(2) **The Secretary of State's filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation applicable at the time of incorporation except as provided in ORS 56.080 or in a proceeding by the state to cancel or revoke the incorporation or involuntarily dissolve the corporation. [1989 c.1010 § 22]**

OFFICIAL COMMENT TO ORS 65.051 (MODEL ACT § 2.03)

(1) *Proposed Changes to the Model Act*: Clarification of the effect of filing (as conclusive of compliance with conditions of incorporation *in effect at the time* of incorporation) has been added to the Model Act provisions since those requirements will vary over time. The term “filed” is clarified to reflect present Oregon practice (which deviates from the Model Act by not giving effect to deposit of documents at the Secretary’s office but rather to their filing after review).

(2) *Effective Changes from Chapter 61 Provisions*: The Model Act provision clears up both an oversight and unnecessary paperwork inherent in existing ORS 61.321 (which was not amended when ORS 61.024 was enacted to allow a delayed effective date, and which also requires actual issuance of a certificate of incorporation rather than mere “filing” as the final step of incorporation).

(3) *Relationship to the Oregon Business Corporation Act*: The proposal directly parallels ORS 60.051 except for: (a) the proposed addition of “applicable at the time of incorporation”; (b) insertion of a clearer statement of when something is “filed”; and (c) addition of a cross-reference to ORS 56.080 which allows withdrawal of documents to prevent their having legal effect under some circumstances.

65.054 LIABILITY FOR PREINCORPORATION TRANSACTIONS

All persons purporting to act as or on behalf of a corporation organized or subject to the authority of this chapter, knowing there was no incorporation under this chapter at the relevant time, may be held to be jointly and severally liable for all liabilities created while so acting if, under the circumstances, it is equitable to do so. [1989 c.1010 § 23]

OFFICIAL COMMENT TO ORS 65.054 (MODEL ACT § 2.04)

(1) *Proposed Changes to the Model Act*: The language used in the Model Act does not have the effects claimed in its commentary, *i.e.*, it imposed absolute, not discretionary, equitable liability. It has been modified to achieve its intent.

(2) *Effective Changes From Chapter 61 Provisions*: Existing ORS 61.940 provides that liability “shall” be imposed on those who

“act as a corporation without authority so to do.” The literal mandatory liability—regardless of whether anyone was misled—was rejected and the archaic and ambiguous language was revised to follow that of the Business Corporation Act.

(3) *Relationship to the Oregon Business Corporation Act*: The Model Act, in its original form, paralleled the proposed changes noted in (1) of the comments and would depart from the Oregon Business Corporation Act. The Business Corporation Act rule of absolute liability for pre-incorporation acts, if applied literally, was deemed to be unduly harsh in a nonprofit context.

65.057 ORGANIZATION OF CORPORATION

(1) After incorporation:

(a) **If initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting at the call of a majority of the directors, with notice as provided in ORS 65.344, to complete the organization of the corporation by appointing officers, adopting bylaws and carrying on any other business brought before the meeting.**

(b) **If initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at the call of a majority of the incorporators with equivalent notice to that specified in ORS 65.344:**

(A) **To complete the organization of the corporation and to elect directors, unless the organization is a corporation sole; or**

(B) **To elect a board of directors which shall complete the organization of the corporation.**

(2) **Action required or permitted by this chapter to be taken by incorporators or directors at an organizational meeting may be taken without a meeting if the action taken is evidenced by one or more written consents describing the action taken and signed by each incorporator or director, in accordance with the procedures of ORS 65.341.**

(3) **An organizational meeting may be held in or out of this state. [1989 c.1010 § 24]**

OFFICIAL COMMENT TO ORS 65.057 (MODEL ACT § 2.05)

(1) *Proposed Changes to the Model Act*: The Model Act’s refer-

ence to § 8.21 (ORS 65.341) is relocated to correctly reflect its subject matter.

Specific reference to directors is added in subsection (2) to avoid implied inapplicability to director held meetings. When directors are not named in the articles, some notice is technically required to assure a majority of incorporators do not effectively exclude a minority from the organizational meeting, even though such an event seems unlikely. Provisions for notice and waiver of notice of directors' meetings (presumably including the organizational meeting) is already provided in ORS 65.344, Model Act § 8.22, and has been cross-referenced so as to cover incorporator-called organizational meetings as well.

(2) *Effective Changes from Chapter 61 Provisions*: The organizational meeting is now triggered by the acts which will constitute incorporation under the proposal (and thus no longer requires a certificate of incorporation to be issued). The proposal also explicitly permits the incorporators to conduct the organizational meeting (rather than having the directors do so as presently provided).

The explicit authorization for accomplishing the organization without a meeting is new. The existing statute's provision for three-day notice to directors of the initial meeting was eliminated as purposeless in light of new provisions for the named directors to call their own meeting or to have incorporators act without directors. A notice to be given to other members of the relevant group by the majority calling the meeting has been substituted.

(3) *Relationship to the Oregon Business Corporation Act*: The Oregon Business Corporation Act (ORS 60.057) is parallel to the Model Act provision. The changes noted in the second paragraph of part (1) of the comments are thus applicable to the Business Corporation Act as well.

65.061 BYLAWS

(1) The incorporators or board of directors of a corporation, whichever completes the organization of the corporation at its organizational meeting, shall adopt initial bylaws for the corporation.

(2) The bylaws may contain any provision for managing and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation. [1989 c.1010 § 25]

OFFICIAL COMMENT TO ORS 65.061 (MODEL ACT § 2.06)

(1) *Proposed Changes to the Model Act*: The Model Act language has been revised to make it clear that whichever group completes the organizational meeting is the one which adopts the bylaws, to avoid any inference of continuing power in the incorporators after that meeting. Other changes to the Model Act parallel the Oregon Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions*: Consistent with the authority in other sections of the proposal for the incorporators to delay naming directors until the end of the organizational meeting, the power to adopt initial bylaws has been extended to them in the proposal. The present statutory "default" provision on power for future bylaws amendments is unnecessary in this section in light of provisions in ORS 65.461, 65.464, 65.467, Model Act §§ 10.20 to 10.22, and were thus omitted.

(3) *Relationship to the Oregon Business Corporation Act*: With the exception of the clarification noted in part (1) of the comments, above, the proposal parallels ORS 60.061.

65.064 EMERGENCY BYLAWS AND POWERS

(1) Unless the articles provide otherwise, the board of directors of a corporation may adopt, amend or repeal bylaws to be effective only in an emergency as defined in subsection (4) of this section. The emergency bylaws, which are subject to amendment or repeal by the members, may provide special procedures necessary for managing the corporation during the emergency, including:

- (a) Procedures for calling a meeting of the board of directors;
- (b) Quorum requirements for the meeting; and
- (c) Designation of additional or substitute directors.

(2) All provisions of the regular bylaws consistent with the emergency bylaws remain effective during the emergency. The emergency bylaws are not effective after the emergency ends.

(3) Corporate action taken in good faith in accordance with the emergency bylaws binds the corporation. A corporate director, officer, employee or agent shall not be liable for deviation from normal procedures if the conduct was authorized by emergency bylaws adopted as provided in this section.

(4) An emergency exists for purposes of this section if a quorum

of the corporation's directors cannot readily be assembled because of some present or imminent catastrophic event. [1989 c.1010 § 26]

OFFICIAL COMMENT TO ORS 65.064 (MODEL ACT § 2.07)

(1) *Proposed Changes to the Model Act*: The immunity, as phrased in the Model Act's § 2.07(c)(2), is inconsistent with the standard of care for directors (ORS 65.357, Model Act § 8.30) and officers (ORS 65.377, Model Act § 8.42) which extends far beyond the kind of procedural and organizational deviations permitted in an emergency. It was reworded in the proposal (subsection (3), second sentence) to avoid impliedly invalidating the standards regarding directors and officers. The definition of "emergency" was also revised to limit the "anticipation" element to imminent situations which justify the extraordinary powers granted. See related ORS 65.081, Model Act § 3.03.

(2) *Effective Changes from Chapter 61 Provisions*: There are no relevant provisions in existing ORS Chapter 61.

(3) *Relationship to the Oregon Business Corporation Act*: This section parallels provisions of the Business Corporation Act and would generally give nonprofit organizations most of the flexibility available to their for-profit counterparts.

ORS 60.064 of the Business Corporation Act does not *explicitly* authorize a board to amend or repeal emergency bylaws as does this proposal, however, and it broadly phrases its authorization as to what emergency bylaws may contain: "all provisions necessary. . . ." That is broader than the Nonprofit Corporation Act's proposed authorization of *procedural* changes. The Model Act language on that issue was adopted as more appropriate in light of subsection (2) which continues all the regular provisions not inconsistent with the emergency provisions and the fact that nonprofit corporations, unlike business corporations, may lack an extra safeguard in that there may be no members in a nonprofit organization to repeal or alter inappropriate emergency bylaws. ORS 60.064 also does not contain the clarification concerning standard of care/immunity for emergency acts noted in part (1) of the comments, *supra*, but the proposal is otherwise parallel to ORS 60.064.

65.067 CORPORATION SOLE

(1) Any individual may, in conformity with the constitution, ca-

nons, rules, regulations and disciplines of any church or religious denomination, form a corporation hereunder to be a corporation sole. Such corporation shall be a form of religious corporation and will differ from other such corporations organized hereunder only in that it shall have no board of directors, need not have officers and shall be managed by a single director who shall be the individual constituting the corporation and its incorporator or the successor of the incorporator.

(2) The name of such corporation shall be the same as the office within the church or religious denomination held by the incorporator, and shall be followed by the words "and successors, a corporation sole."

(3) All of the provisions of ORS 65.044 to 65.067 shall apply to such corporation. If the corporation has no officers, the director may perform any act required by or permitted by an officer in the same manner and with the same effect as though such act were performed by one or more officers of the corporation. [1989 c.1010 § 27]

OFFICIAL COMMENT TO ORS 65.067 (MODEL ACT § (NONE))

(1) *Proposed Changes to the Model Act*: The Model Act has no "corporation sole" provisions. They were added to accommodate the unique structure of existing corporations sole, in which the incorporator or his/her successor in religious office serves as a sole director and officer.

(2) *Effective Changes from Chapter 61 Provisions*: Certain erroneous cross-references have been corrected.

(3) *Relationship to the Oregon Business Corporation Act*: No comparable provision.

PURPOSES AND POWERS

65.074 PURPOSES

(1) Every corporation incorporated under this chapter has the purpose of engaging in any lawful activity unless a more limited purpose is set forth in the articles of incorporation.

(2) A corporation that is subject to regulation under another statute of this state may not be incorporated under this chapter if such organization is required to be organized under such other statute. [1989 c.1010 § 28]

OFFICIAL COMMENT TO ORS 65.074 (MODEL ACT § 3.01)

(1) *Proposed Changes to the Model Act*: Subsection (2) has been reworded for consistency with the Oregon Business Corporation Act, which states the matter less restrictively than the Model Act, *i.e.*, a corporation can be organized under this Act unless another regulatory provision specifically requires organization under other provisions.

(2) *Effective Changes from Chapter 61 Provisions*: Existing ORS 61.051 is not self-effectuating, *i.e.*, does not grant any powers *per se*, but rather is only permissive. Consistent with the provisions in Model Act § 2.02(d), ORS 65.047(4) does not require any powers to be stated in the articles. Existing law also limits the permissible purposes for a corporation organized under the Nonprofit Corporation Act by requiring that “none of (its purposes) is for profit.” The restriction, while a logical means to distinguish which corporations should organize under the Oregon Business Corporation Act and which should organize under this Act, was rejected as both too narrow and as unnecessary.

Modern nonprofits frequently engage in activities which, viewed individually, are intended to generate income in excess of expenses in order to support their religious, charitable or mutual benefit functions. Bingo games, concerts, Christmas bazaars, and gift shops are among the many common examples. While it is true that the organization’s ultimate purpose is not “to generate a profit” but to support more fundamental goals, the current statutory language is both confusing to laymen and unnecessary.

Mere incorporation under Chapter 61 does not entitle a corporation to any special tax breaks or other benefits. In light of the distribution restrictions of Chapters 13 and 14 in the Model Act, the elimination of the restriction on purposes should not result in for-profit entities trying to incorporate under Chapter 65. The Task Force recognized that there might be some organizers of what essentially are business enterprises who may desire to use the Nonprofit Act purely for the publicity advantage of the term “nonprofit.” It was felt, however, that the organizers would find themselves so severely restricted in the use of any profit that their scheme would be unworkable. Accordingly, the Task Force followed the Model Act on this issue and did not include a limitation on purposes.

The third change from existing provisions is the explicit statement in subsection (2) of the circumstances governing availability of this Act for formation of regulated corporations. That restriction was not previously covered in ORS Chapter 61.

(3) *Relationship to the Oregon Business Corporation Act*: Subsection (1) of the proposal parallels ORS 60.074(1) with the exception that it uses the phrase “lawful activity” where the Business Corporation Act uses the term “lawful business,” to reflect the latter’s entrepreneurial character. Subsection (2) similarly follows ORS 60.074(2) as it is proposed to be amended. The amendment has the effect of allowing organization under the Business Corporation Act unless another statute *explicitly* requires organization under some other statute.

65.077 GENERAL POWERS

Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs, including, without limitation, power to:

- (1) Sue and be sued, complain and defend in its corporate name.
- (2) Have a corporate seal, which may be altered at will, and to use it, or a facsimile of it, by impressing or affixing or reproducing it in any other manner.
- (3) Make and amend bylaws not inconsistent with its articles of incorporation or with the laws of this state, for regulating and managing the affairs of the corporation.
- (4) Purchase, take by gift, devise or bequest, receive, lease or otherwise acquire, and own, hold, improve, use and otherwise deal with, real or personal property or any interest in property, wherever located.
- (5) Sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property.
- (6) Purchase, receive, subscribe for or otherwise acquire, own, hold, vote, use, sell, mortgage, lend, pledge or otherwise dispose of and deal in or with shares or other interests in or obligations of any other entity.
- (7) Make contracts and guarantees, incur liabilities, borrow money, issue notes, bonds and other obligations, and secure any of

its obligations by mortgage or pledge of any of its property, franchises or income.

(8) Lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment, except as limited by ORS 65.364.

(9) Be a promoter, partner, member, associate or manager of any partnership, joint venture, trust or other entity.

(10) Conduct its activities, locate offices and exercise the powers granted by this chapter within or without this state.

(11) Elect or appoint directors, officers, employees, and agents of the corporation, define their duties and fix their compensation, if any.

(12) Pay pensions and establish pension plans, pension trusts and other benefit and incentive plans for any or all of its current or former directors, officers, employees and agents.

(13) Unless otherwise provided in the articles of incorporation, make donations not inconsistent with law for the public welfare or for charitable, benevolent, religious, scientific or educational purposes and for other purposes that further the corporate interest.

(14) Impose dues, assessments, admission and transfer fees upon its members.

(15) Establish conditions for admission of members, admit members and issue memberships.

(16) Carry on a business.

(17) Do any other act, not inconsistent with law, that furthers the activities and affairs of the corporation.

(18) Dissolve, merge or reorganize as provided in this chapter. [1989 c.1010 § 29]

OFFICIAL COMMENT TO ORS 65.077 (MODEL ACT § 3.02)

(1) *Proposed Changes to the Model Act:* Grammatical and stylistic changes have been made in the lead paragraph, and in parts (2), (4), (6) and (17) for consistency with the Oregon Business Corporation Act.

A reference to acquisition by “gift, devise or bequest” has been added to item (4) from existing ORS Chapter 61 provisions as a clarification, since such acquisitions are common to nonprofit corporations. The word “other” has been added to item (6) to parallel

ORS Chapter 60 and clarify that in the case of nonprofits the provision does not deal with the corporation’s own shares.

An explicit cross-reference to potential restrictions in the articles on donations has been added to part (13) from existing law because of donor sensitivity and legal restrictions on rechanneling donations given with restricted purposes; the authorization of “benevolent” donations in item (13) has been retained from present law because its meaning is slightly different from other terms included in the Model Act. Item (18) has been retained from existing law (reworded) to avoid any inference of intended repeal of such powers.

(2) *Effective Changes from Chapter 61 Provisions:* The language and format of the proposal follows the Oregon Business Corporation Act’s corollary provision (ORS 60.077) rather than existing ORS 61.061. In most cases, the substance remains unchanged. Archaic language (such as to “take” or “employ” property or surrender the corporation “franchise”) has been updated, and redundancies have been eliminated (*i.e.*, “property *and assets*” and “charitable *and eleemosynary*”). The illustrative list of kinds of obligations which may be dealt in has been subsumed in broader language (“shares or other interests in, or obligations of, *any other entity*,” a term which is broadly defined in ORS 65.001, Model Act § 1.40).

The specific reference to the corporation’s power to determine acceptable interest rates (found in ORS 61.061(8)) was deleted as unnecessary, in light of the other powers. ORS 60.061(9)’s formulation of restrictions on lending (*i.e.*, to those situations which further “its corporate purposes”) would be meaningless under the proposal’s “any lawful activity” formulation of permissible purpose; it was replaced by cross-reference to the restrictions in ORS 65.364, Model Act § 8.32, on director/officer loans, as suggested in the Model Act. The present statute’s restrictive reference to taking security to assure “repayment of funds so loaned or invested” is expanded by deleting the reference to loans or investments so that it clearly encompasses taking security for unpaid debts as well. Appointment power has been extended to cover directors and employees. Former provisions for pensions have been expanded to cover “other benefit and incentive plans” as well. Finally, the former section on donations (paragraph (13)) has been restricted by the clause “not inconsistent with other law,” and reference to war time dona-

tions were deleted because they are subsumed in the concept of “public welfare” donations.

(3) *Relationship to the Oregon Business Corporation Act*: The lead-in paragraphs parallel ORS 60.077(1) and (2). Throughout, the proposal refers to a corporation’s “activities” rather than its “business,” however. The reference to “gift” is not expressly contained in ORS 60.077(2)(d), nor is the word “transfer,” which is found in item (5) of the proposal. Both were included from the Model Act as appropriate powers, even though they may otherwise have been covered in the catch-all provision (17).

Portions of ORS 60.077(2)(g) are omitted since nonprofit corporations will not have shares. Similarly, the reference in 60.077(2)(m) to “share option plans” for pension plans has been deleted as inappropriate to nonprofit corporations.

Part (8) adds a cross-reference to restrictions on loans which is not found in Chapter 60. The provisions of ORS 60.077(2)(L) (specifically authorizing loans to directors, officers, employees and agents) have been deleted, although the general lending provisions would permit them except to officers and directors for whom inclusion would be inconsistent with ORS 65.364, Model Act § 8.32. The appointment authority is expanded to include directors, since their method of selection in nonprofit corporations may differ from for-profit corporations’ mechanisms. Finally, the restrictions on donations found in part (13) of the proposal (“not inconsistent with law” or the articles) do not appear in the Business Corporation Act’s corollary (ORS 60.077(2)(n)), but the proposal, unlike Chapter 60, does authorize religious donations in view of the religious purpose of many nonprofits. Parts (14) and (15) (regarding dues and memberships) and (18) (dissolution) have no counterparts in Chapter 60 but are consistent with existing nonprofit law.

65.081 EMERGENCY POWERS

(1) During an emergency defined in subsection (4) of this section, the board of directors or a corporation may:

(a) Modify lines of succession to accommodate the incapacity of any director, officer, employee or agent; or

(b) Relocate the principal office, designate alternative principal offices or regional offices or authorize the officers to do so.

(2) During an emergency defined in subsection (4) of this section, unless emergency bylaws provide otherwise:

(a) Notice of a meeting of the board of directors need be given only to those directors whom it is practicable to reach and may be given in any practicable manner, including by publication or radio; and

(b) One or more officers of the corporation present at a meeting of the board of directors may be deemed to be directors for purposes of the meeting, in order of the officer’s rank, and within the same rank in order of seniority, as necessary to achieve a quorum.

(3) Corporate action taken in good faith under this section to further the affairs of the corporation during an emergency binds the corporation. A corporate director, officer, employee or agent shall not be liable for deviation from normal procedures if the conduct was authorized by emergency powers provided in this chapter.

(4) An emergency exists for purposes of this section if a quorum of the corporation’s directors cannot readily be assembled because of some present or imminent catastrophic event. [1989 c.1010 § 30]

OFFICIAL COMMENT TO ORS 65.081 (MODEL ACT § 3.03)

(1) *Proposed Changes to the Model Act*: The proposed changes are technical clarifications for consistency with the Oregon Business Corporation Act, and to permit use of emergency powers in “anticipation” of an event but to limit their use to situations where the event is imminent and likely to have disruptive effects justifying these extraordinary powers. The immunity for actions in an emergency is narrowed so that it is not absolute, but rather only protects acts which conform to the specific special emergency powers granted or otherwise proper.

(2) *Effective Changes from Chapter 61 Provisions*: The provisions waive existing notice, quorum and appointment procedures as may be necessary to operate in the face of an actual or anticipated “catastrophic event.” No authority on the subject is contained in present Oregon Nonprofit Corporation Law.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal parallels ORS 60.081 with the exception of the clarification suggested for part (3) and the definition of emergency. See Section (1) of the comments.

(4) *Other Comments*: If all corporations used the power pro-

posed in ORS 65.064, Model Act § 2.07, to adopt emergency by-laws, this section might be unnecessary. Since many corporations will fail to do so, and others may adopt inadequate provisions, this section was felt to be appropriate, especially since many nonprofit corporations' functions relate to medical care or emergency assistance. The broad authority to use the powers even "in anticipation of" an emergency seems appropriate since the panic attendant on a known approaching disaster can be as disruptive as the actual disaster itself. A clarification of the definition of "emergency," limiting it to an imminent event, has been added to preclude abuse, however.

65.084 CHALLENGE OF CORPORATE AUTHORITY; REMEDY

(1) **Except as provided in subsection (2) of this section, the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.**

(2) **A corporation's power to act may be challenged:**

(a) **In a proceeding by a member or members, a director or the Attorney General against the corporation to enjoin the act;**

(b) **In a proceeding by the corporation, directly, derivatively or through a receiver, a trustee or other legal representative, including the Attorney General in the case of a public benefit corporation, against an incumbent or former director, officer, employee or agent of the corporation; or**

(c) **In a proceeding under ORS 65.664.**

(3) **In a proceeding under paragraph (a) of subsection (2) of this section to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding, and may award damages for loss other than anticipated profits suffered by the corporation or another party because of enjoining the unauthorized act. [1989 c.1010 § 31]**

OFFICIAL COMMENT TO ORS 65.084 (MODEL ACT § 3.04)

(1) *Proposed Changes to the Model Act:* Changes in format are proposed to conform this section to the Oregon Business Corporation Act, without altering the Model Act's general substance. However, the limitation in the Model Act § 3.04(b) ("where a third party has not acquired rights") has been eliminated and a new section (c), taken from the Oregon Business Corporation Act and existing ORS 61.065, has been substituted to more clearly define when

injunctive relief can affect other parties' rights. A new provision (2)(c), cross-referencing the power to challenge corporate acts in a dissolution proceeding, has been added.

(2) *Effective Changes from Chapter 61 Provisions:* The recognition of the Attorney General's power to act derivatively to impose damages against directors, officers, employees and agents of public benefit corporations is new; explicit statement of his power to challenge unauthorized acts in a dissolution proceeding is also new in this section but is consistent with powers presently expressed in ORS 61.565(1)(c).

(3) *Relationship to the Oregon Business Corporation Act:* The proposal follows the Oregon Business Corporation Act, substituting "member" for "shareholder," but uses the Model Act substantive provisions which also allow a director or the Attorney General to seek an injunction (since there may be no members) and recognizes the Attorney General's right to sue directors, officers, agents or employees on behalf of a public benefit corporation.

NAME

65.094 CORPORATE NAME

(1) **A corporate name may not contain language stating or implying that the corporation is organized for a purpose other than that permitted by ORS 65.074 and the articles of incorporation.**

(2) **A corporate name shall not contain the word "cooperative" or the phrase "limited partnership."**

(3) **A corporate name shall be written in the alphabet used to write the English language but may include Arabic and Roman numerals and incidental punctuation.**

(4) **Except as authorized by subsection (5) of this section, a corporate name shall be distinguishable upon the records of the Office of the Secretary of State from any other corporate name, professional corporate name, business corporate name, cooperative name, limited partnership name, business trust name, reserved name, registered corporate name or assumed business name of active record with the Office of the Secretary of State.**

(5) **The corporate name need not satisfy the requirement of subsection (4) of this section if the applicant delivers to the Office of the Secretary of State a certified copy of a final judgment of a court**

of competent jurisdiction that finds that the applicant has a prior or concurrent right to use the corporate name in this state.

(6) The provisions of this section do not prohibit a corporation from transacting business under an assumed business name.

(7) The provisions of this section do not:

(a) Abrogate or limit the law governing unfair competition or unfair trade practices; or

(b) Derogate from the common law, the principles of equity or the statutes of this state or of the United States with respect to the right to acquire and protect trade names. [1989 c.1010 § 32]

OFFICIAL COMMENT TO ORS 65.094 (MODEL ACT § 4.01)

(1) *Proposed Changes to the Model Act*: The Model Act has no provisions precluding use of the word “cooperative,” as required in both Oregon’s present Business Corporation Act and its Nonprofit Corporation Law; the restriction has been added to avoid confusion with organizations formed pursuant to ORS Chapter 62. A similar restriction has been added with respect to the phrase “limited partnership,” which is reserved for Chapter 70 organizations. The Model Act has no restrictions on the symbols or characters used in a name; the proposal adds the same restrictions as presently apply to both for-profit and nonprofit corporations in Oregon.

The Model Act provisions are more restrictive than the proposal by prohibiting use of indistinguishable names of any corporation ever incorporated or authorized to do business in the state; the proposed revision follows the current Oregon Business Corporation Act and Nonprofit Corporation Law sections which limit the restriction to names “of active record with the office of the Secretary of State.” The proposal is more restrictive than the Model Act, however, by adopting the current Business Corporation Act and Nonprofit Corporation Law sections which preclude use of names of active record by any of a number of forms of organization (professional corporations, cooperatives, limited partnerships, and business trusts in addition to names recorded, registered or reserved by nonprofit and business corporations), and by restricting use of names indistinguishable from any assumed business name of active record, other than just those of foreign corporations unable to use their real name.

Technical language in ORS 65.094(5), Model Act subsection

(c)(2) (concerning judicially authorized uses), has been altered to conform to present Oregon Business Corporation Act and Nonprofit Corporation Law provisions. Model Act sections allowing use of a name acquired by consent, merger, reorganization or purchase have been deleted as superfluous. Explicit provisions have been added paralleling the Oregon Business Corporation Act sections on the relationship between a name authorized under this section and rights based on the law of unfair trade practices or common law trade names. The same result is assumed in the Model Act commentary but not explicitly addressed in its text.

(2) *Effective Changes from Chapter 61 Provisions*: Subsection (1) of the proposal is a new restriction not found in Chapter 61, as are the prohibitions on use of the phrase “limited partnership” and use of any name that is misleading about the organization’s limited purposes (where applicable). Otherwise, the proposal is identical to ORS 60.094.

(3) *Relationship to the Oregon Business Corporation Act*: The proposed provisions do not require nonprofit corporations to make use of “corporation,” “incorporated,” “company,” “limited,” or their abbreviations, as does ORS 60.094(1). Otherwise, except as noted in (2) of these comments, the proposal is the same as the Oregon Business Corporation Act’s section (ORS 60.094), which is currently incorporated in Chapter 61’s provisions.

65.097 RESERVED NAME

(1) A person may apply to the Office of the Secretary of State to reserve a corporate name. The application must set forth the name and address of the applicant and the name proposed to be reserved.

(2) If the Secretary of State finds that the corporate name applied for conforms to ORS 65.094, the Secretary of State shall reserve the name for the applicant for a 120-day period, following which the applicant may reapply for it on the same basis as other applicants.

(3) A person may transfer the reservation of a corporate name to another person by delivering to the Office of the Secretary of State a notice of the transfer executed by the person for whom the name was reserved and specifying the name and address of the transferee. [1989 c.1010 § 33]

OFFICIAL COMMENT TO ORS 65.097 (MODEL ACT § 4.02)

(1) *Proposed Changes to the Model Act*: Current Oregon Business Corporation and Nonprofit Corporation Law sections have been substituted for the Model Act provisions both for uniformity and to avoid the Model's inappropriate use of terms such as "owner" and "exclusive." The substance is basically unchanged from the Model Act, as interpreted by its commentary, however, with the following exception: the Model Act's description of the 120-day reservation period as "nonrenewable" has not been included because it is misleading and ambiguous. If the intent were to preclude holding a name for more than 120 days, a person could easily avoid the prohibition against his renewal of a reservation by having someone else file a new reservation and transfer it to him. It is apparent from the comments to the Model Act that all that is intended is that the original holder cannot be assured of continuity or priority but after the 120 days must reapply and take his chances. That is the present law in Oregon as well. It was felt that use of the term "nonrenewable" for that concept is apt to confuse and prejudice many applicants. A more explicit clause concerning reapplication has been substituted.

(2) *Changes from Chapter 61 Provisions*: Only the clarification concerning reapplication (rather than "renewal") is different. That change was requested by the Corporation Division, to reflect the lack of priority in the prior holder after the reserved period expires.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal is identical to ORS 60.097 except as noted in part (2) of these comments.

65.101 REGISTERED NAME

(1) A foreign corporation may apply to the Office of the Secretary of State to register its corporate name.

(2) The application must set forth the corporate name, the state or country of its incorporation, the date of its incorporation, a brief description of the nature of the activities in which it is engaged and a statement that it is not carrying on or doing business in the State of Oregon. The application must be accompanied by a certificate of existence or a document of similar import current within 60 days of delivery, duly authenticated by the official having custody of corpo-

rate records in the state or country under whose law it is incorporated.

(3) If the Secretary of State finds that the name conforms to ORS 65.094, the Secretary of State shall register the name effective for one year.

(4) A foreign corporation whose registration is effective may renew it for successive years by delivering to the Secretary of State for filing a renewal application which complies with the requirements of this section prior to the lapse of the previous registration. Filing of the renewal application renews the registration for an additional year from its prior expiration.

(5) A foreign corporation whose registration is effective may thereafter qualify to do business in this state as a foreign corporation under that name or transfer the registered name to another applicant for the name by the procedures provided in ORS 65.097 (3) with respect to reserved names. Filing of such a consent terminates the prior registration and operates as a reservation in the name of the transferee, if it does not simultaneously file under that name. [1989 c.1010 § 34]

OFFICIAL COMMENT TO ORS 65.101 (MODEL ACT § 4.03)

(1) *Proposed Changes to the Model Act*: The Model Act's restatement of material found in ORS 65.094, Model Act § 4.01 (for domestic corporations) and ORS 65.717, Model Act § 15.06 (for foreign corporations) was felt to be unnecessary and potentially dangerous, since an integrated system is feasible only if all parts are subject to the identical rules. The provisions of Oregon's Business Corporation Act have been substituted for those of the Model Act.

(2) *Effective Changes from Chapter 61 Provisions*: None. The proposal is identical to ORS 60.101, already incorporated by reference in ORS 61.081.

(3) *Relationship to the Oregon Business Corporation Act*: Identical to ORS 60.101, except for the addition of subsections (4) and (5).

OFFICE AND AGENT

65.111 REGISTERED OFFICE AND REGISTERED AGENT

Each corporation shall continuously maintain in this state both:

(1) A registered agent, who shall be:

- (a) An individual who resides in this state;
 - (b) A domestic business or nonprofit corporation with an office in this state; or
 - (c) A foreign business or nonprofit corporation authorized to transact business in this state with an office in this state; and
- (2) A registered office of the corporation, which shall be the residence or office address of the registered agent. [1989 c.1010 § 35]

OFFICIAL COMMENT TO ORS 65.111 (MODEL ACT § 5.01)

(1) *Proposed Changes to the Model Act:* The title to this section was corrected to reflect its true subject. The provisions concerning qualification to serve as agent were made mandatory (as was probably intended by the Model Act drafters), which is consistent with the Oregon Business Corporation Act. The provisions have also been reworded to eliminate the inference that either a nonprofit corporation or its agent must have an actual "office," since nonprofit corporations and their agents frequently do not.

(2) *Effective Changes from Chapter 61 Provisions:* The existing Oregon statute does not expressly permit a location other than a business office to be the registered office; the proposal does.

(3) *Relationship to the Oregon Business Corporation Act:* ORS 60.111 expressly provides for "a registered agent and registered office that may be, but need not be, the same as any of its places of business." Because the agent must be at the "registered office," however, and many nonprofit corporations do not have either a place of business or an office, the proposal expressly allows use of the agent's residence address.

65.114 CHANGE OF REGISTERED OFFICE OR REGISTERED AGENT

- (1) A corporation may change its registered office or registered agent by delivering to the Office of the Secretary of State for filing a statement of change that sets forth:
- (a) The name of the corporation;
 - (b) If the current registered office is to be changed, the address, including the street and number, of the new registered office;
 - (c) If the current registered agent is to be changed, the name of the new registered agent and a statement that the new agent has consented to the appointment; and
 - (d) A statement that after the change or changes are made, the

street addresses of its registered office and the office or residence address of its registered agent will be identical.

(2) If the registered agent changes the street address of the agent's designated office or residence, the registered agent shall change the street address of the registered office of any corporation for which the registered agent is the registered agent by notifying the corporation in writing of the change and by signing, either manually or in facsimile, and delivering to the Office of the Secretary of State for filing a statement that complies with the requirements of subsection (1) of this section and recites that the corporation has been notified of the change.

(3) The filing by the Secretary of State of a statement submitted under this section shall terminate the existing registered office or agent, or both, on the effective date of the filing and establish the newly appointed registered office or agent, or both, as that of the corporation. [1989 c.1010 § 36]

OFFICIAL COMMENT TO ORS 65.114 (MODEL ACT § 5.02)

(1) *Proposed Changes to the Model Act:* The Model Act has been revised for consistency with the parallel provisions of the Oregon Business Corporation Act, which does not require information about the previous address and agent, makes the notice of address change in subsection (2) mandatory, and contains a provision concerning the effect of a notice.

Unlike the Model Act, the proposal requires a statement that a new agent has consented to serve but does not require *evidence* of consent of the new agent. In that respect, it follows the Oregon Business Corporation Act. The penalties for false statements in documents submitted for filing (ORS 65.990, Model Act § 1.29) should be sufficient to assure the accuracy of that representation.

(2) *Effective Changes from Chapter 61 Provisions:* Chapter 61 presently incorporates the Oregon Business Corporation Act section by reference. See part (3) of the Comments.

(3) *Relationship to the Oregon Business Corporation Act:* A departure is made from the Oregon Business Corporation Act in (1)(d) and (2) to reflect the differences between ORS 65.111 (Model Act § 5.01) and its Oregon Business Corporation counterpart (ORS 60.111)—*i.e.*, that a nonprofit corporation and its agent need not have a true "office," and may use the agent's residence address.

65.117 RESIGNATION OF REGISTERED AGENT

(1) A registered agent may resign as registered agent upon delivering a signed statement to the Office of the Secretary of State for filing. The statement may include a statement that the registered office is also discontinued.

(2) After filing the statement, the Secretary of State shall immediately mail the copy to the corporation at its principal office as shown in the most recent annual report filed pursuant to ORS 65.787 or if none, the address specified in the articles of incorporation.

(3) The agency appointment is terminated, and the registered office discontinued if so provided, on the 31st day after the date on which the statement was filed by the Secretary of State, unless the corporation shall sooner appoint a successor registered agent as provided in ORS 65.114 thereby terminating the capacity of the prior agent. [1989 c.1010 § 37]

OFFICIAL COMMENT TO ORS 65.117 (MODEL ACT § 5.03)

(1) *Proposed Changes to the Model Act:* Technical changes for consistency with the Oregon Business Corporation Act specify delivery to the *office* of the Secretary, not the Secretary *per se*, require the Secretary to take action “immediately,” and provide for early effect of a notice when a successor is named before the 30 days run.

By eliminating names and addresses of directors from the articles and not requiring designation of any “principal office” in incorporation documents, the Model Act (without revision) would leave the Secretary no effective contact point for a new corporation if the agent resigns and discontinues the registered office before an annual report is filed. That problem was solved by departing from the Model Act and following the Oregon Business Corporation Act in ORS 65.047(1)(e), which requires designation of a “principal office” in the articles of incorporation. A cross-reference to the designation in the articles has been added to subsection (2).

The provisions in the Model Act’s subsection (a) for the agent to deliver *two* copies of the notice to the Secretary’s office, and in subsection (b) for the Secretary to mail one of them back to the registered office, have been rejected. Unless a successor agent is appointed virtually simultaneously, that act would only result in returning the notice to its sender. Even if the new agent *is* simultane-

ously appointed, notice to him of the change is superfluous since appointment of a successor can only have occurred with his consent in any event. See ORS 65.114(1)(c), Model Act, and the Oregon Business Corporation Act’s language.

(2) *Effective Changes from Chapter 61 Provisions:* Chapter 61 currently incorporates the provisions of the Oregon Business Corporation Act. See part (3) of the comments.

(3) *Relationship to the Oregon Business Corporation Act:* The proposal, as revised, parallels the Oregon Business Corporation Act in all respects. However, this assumes no procedural difference between “notify” and “mailing”; compare ORS 65.117(2) and ORS 60.117(2).

65.121 SERVICE ON THE CORPORATION

The provisions of ORS 60.121 shall apply to corporations organized under or subject to the provisions of this chapter. [1989 c.1010 § 38; 1991 c.67 § 12]

OFFICIAL COMMENT TO ORS 65.121 (MODEL ACT § 5.04)

(1) *Proposed Changes to the Model Act:* The service provisions of the Model Act differ substantially from those of the Oregon Business Corporation Act (which is incorporated by reference in the present ORS Chapter 61) by providing for service on the “principal office” in lieu of the registered agent. As noted in earlier comments, nonprofit corporations are *especially* unlikely to have such an office, as they are defined in the unrevised Model Act—leaving a plaintiff without a remedy when the registered agent has resigned. The Oregon Business Corporation Act allows substituted service on the Secretary of State after efforts to locate a corporate representative for actual notice have been tried and failed; those provisions are adopted here.

Model Act provisions concerning the effective date of service are also deleted both for consistency with the Oregon Business Corporation Act and to avoid inadvertent conflict with rules of civil procedure, which cover that subject in detail.

(2) *Effective Changes from Chapter 61 Provisions:* None.

(3) *Relationship to the Oregon Business Corporation Act:* Identical provisions; see part (1) of the comments.

MEMBERS AND MEMBERSHIPS

(ADMISSION OF MEMBERS)

65.131 ADMISSION

(1) **The articles or bylaws may establish criteria or procedures for admission of members.**

(2) **No person shall be admitted as a member without consent of the person, express or implied. [1989 c.1010 § 39]**

OFFICIAL COMMENT TO ORS 65.131 (MODEL ACT § 6.01)

(1) *Proposed Changes to the Model Act:* The commentary to the Model Act states that consent may be express or implied. The proposal puts this into the statutory language, because the term “consent” alone might suggest that express consent is required. The change clarifies for lay persons that an affirmative act of consent is not required to be admitted as a member; consent can be implied from the circumstances.

(2) *Effective Changes from Chapter 61 Provisions:* While ORS 61.091, corresponding to ORS 65.144 (Model Act § 6.10), permits establishing differences in rights and obligations of classes of members, no provision in current law states that the articles or bylaws may define who members are or how they may be admitted. The provision requiring consent of a member before admission makes membership a bilateral relationship.

(3) *Relationship to the Oregon Business Corporation Act:* No comparable provision.

(4) *Other Comments:* Subsection (2) derives from California Nonprofit Corporation Law §§ 5350(b) (public benefit), 7350(b) (mutual benefit), and 9350(b) (religious), although the California Act only prohibits imposing the *obligations* of membership without consent and does not prohibit imposing *membership* without consent.

65.134 CONSIDERATION

Except as provided in its articles or bylaws, a corporation may admit members for no consideration or for such consideration as is determined by the board. [1989 c.1010 § 40]

OFFICIAL COMMENT TO ORS 65.134 (MODEL ACT § 6.02)

(1) *Proposed Changes to the Model Act:* None.

(2) *Effective Changes from Chapter 61 Provisions:* The proposal makes clear that no consideration is required for membership and that establishing the amount of consideration is to be done by the board from time to time.

(3) *Relationship to the Oregon Business Corporation Act:* No comparable provision.

(4) *Other Comments:* Section 6.02 of Model Act is based on California Nonprofit Corporation Law §§ 5311 (public benefit), 7311 (mutual benefit), and 9311 (religious).

65.137 NO REQUIREMENT FOR MEMBERS

A corporation is not required to have members. A corporation shall have no members if its articles of incorporation or bylaws include a statement that “the corporation shall have no members” or words of similar import. [1989 c.1010 § 41]

OFFICIAL COMMENT TO ORS 65.137 (MODEL ACT § 6.03)

(1) *Proposed Changes to the Model Act:* The first sentence of the proposal has a different meaning from the Model Act in light of the expanded definition of membership in ORS 65.001(23) as compared with Model Act § 1.40. The second sentence is intended to carry over from ORS 61.091 the provisions allowing nonprofit corporations to have no members if their articles or bylaws so state.

(2) *Effective Changes from Chapter 61 Provisions:* None.

(3) *Relationship to the Oregon Business Corporation Act:* The nonprofit statute is the opposite of ORS 60.131(1), which requires a business corporation to have shares, and ORS 60.131(2), which requires one or more classes of shares to have unlimited voting rights.

(MEMBERS' RIGHTS AND OBLIGATIONS)

65.144 DIFFERENCES IN RIGHTS AND OBLIGATIONS OF MEMBERS

All members shall have the same rights and obligations with respect to voting, dissolution, redemption and transfer, unless the articles or bylaws establish classes of membership with different rights or obligations. All members shall have the same rights and

obligations with respect to any other matters, except as set forth in or authorized by the articles or bylaws. [1989 c.1010 § 42]

OFFICIAL COMMENT TO ORS 65.144 (MODEL ACT § 6.10)

(1) *Proposed Changes to the Model Act:* The proposal adopts the Model Act language but has a different meaning in light of the expanded definition of membership in ORS 65.001(23) as compared with Model Act § 1.40. If the corporation has different classes of members, the articles or bylaws must identify which class is entitled to vote on each matter with regard to which members have the right to vote. For instance, a person entitled to vote on amendments to the articles of incorporation is a member with voting privileges and is entitled to vote on organic transactions, unless such member's voting rights are limited.

(2) *Effective Changes from Chapter 61 Provisions:* Current law authorizes classes of members but does not expressly state that in the absence of classes, members are equal. Under the proposal, unless there are classes of members, all members have the same voting rights, and all members are equal with regard to dissolution, redemption, and transfer.

The proposal makes clear which distinctions among members establish a "class": differences with respect to voting, dissolution, redemption, or transfer. See the definition of "class" in ORS 65.001(6), Model Act § 1.40.

(3) *Relationship to the Oregon Business Corporation Act:* ORS 60.131 is similar in general approach. There is no counterpart to ORS 60.131(2), which requires there to be one or more classes with unlimited voting rights. Nor is there any counterpart to ORS 60.134, which allows the terms of a class or series to be determined by the board of directors.

(4) *Other Comments:* Although this provision provides flexibility where needed, most corporations with members will not have classes. Unless there are classes of members, all members are equal with regard to voting.

65.147 TRANSFERS

(1) **Except as provided in ORS 65.231 pertaining to proxies or as set forth in or authorized by the articles or bylaws, no member may transfer a membership or any right arising therefrom.**

(2) **No member of a public benefit or religious corporation may transfer for value a membership or any right arising therefrom, unless the transferring member is a public benefit or religious corporation.**

(3) **Where transfer rights have been provided, no restriction on them shall be binding with respect to a member holding a membership issued prior to the adoption of the restriction unless the restriction is approved by the members and the affected member.** [1989 c.1010 § 43]

OFFICIAL COMMENT TO ORS 65.147 (MODEL ACT § 6.11)

(1) *Proposed Changes to the Model Act:* The proposal would prohibit transferring a membership in a public benefit or religious corporation for value, while the Model Act would prohibit such transfers entirely. The reasons given in the Model Act commentary for so broad a prohibition are not persuasive. One reason is that memberships in public benefit and religious corporations are "not securities" and "should not be sold for value," but these reasons to prohibit profit-seeking (which is alien to membership in such corporations) do not apply to all transfers.

Transfer of memberships may be a way to change the sponsorship of a public benefit corporation. Where members have the right to elect directors, the members' control over the business and assets of the nonprofit corporation is similar to the stockholders' control over those of the business corporation. Just as control over a business corporation can be gained through stock acquisition, control over a nonprofit corporation can be obtained through voting power. When an entity obtains the right to appoint or remove a nonprofit corporation's directors, the event is referred to as a change of sponsorship or membership. Affiliation between one nonprofit corporation and one or more other nonprofit corporations is often done through gaining control of membership voting rights. Sponsorship or affiliation may be effectuated through transferring the rights of one or more voting members that have the power to elect the entire board of directors.

For public benefit or religious corporations, the only restriction that the proposal would impose is that the transfer cannot be for value. The Model Act commentary argues that gift of memberships should be prohibited, because this would pass membership rights

without regard to the qualifications of the new members. In fact, as stated in ORS 65.131(1), Model Act § 6.01(a), the corporation may establish qualifications for admission of members which would apply equally upon transfer.

There can be valid noncommercial reasons for transferring membership in public benefit or religious corporations. For example, membership in a religious corporation may be familial or may pass from generation to generation. A public benefit or religious corporation may be controlled by a sole corporate member, and assignment of the membership may be consistent with public benefit or religious status.

The limitation on a public benefit or religious corporation transferring membership rights for value does not apply if the member is a public benefit or religious corporation. The same change has been made to ORS 65.171, Model Act § 6.22, regarding purchase of memberships.

ORS 65.231, Model Act § 7.24, authorizes proxy voting, unless the articles or bylaws provide otherwise. Proxy voting transfers a right arising from membership. Therefore ORS 65.231, Model Act § 7.24 (pertaining to proxies), is carved out as an exception to the rule requiring authority for transfers of membership rights to be in the articles or bylaws.

(2) *Effective Changes from Chapter 61 Provisions*: Current law permits issuing “certificates evidencing membership” but prohibits issuing “shares of stock.” This does not clarify whether memberships are transferable.

Subsection (1) establishes that transfer rights must be in the articles or bylaws. This may require some corporations to amend their articles or bylaws but should not upset existing expectations unduly. Most nonprofit corporations probably do not permit memberships to be transferred, and most of those that do probably already have a provision in their articles or bylaws.

Subsection (2) establishes that no transfer of membership rights in a public benefit or religious corporation can be for value, except where the member is another public benefit or religious corporation. Subsection (3) requires members’ consent to changes in transfer rights.

(3) *Relationship to the Oregon Business Corporation Act*: Subsection (3) is comparable to ORS 60.167(1).

(4) *Other Comments*: The proposal substantially follows California’s Nonprofit Corporation Law §§ 5320 (public benefit), 7320 (mutual benefit), and 9320 (religious).

65.151 MEMBER’S LIABILITY TO THIRD PARTIES

A member of a corporation is not personally liable for the acts, debts, liabilities or obligations of the corporation merely by reason of being a member. [1989 c.1010 § 44]

OFFICIAL COMMENT TO ORS 65.151 (MODEL ACT § 6.12)

(1) *Proposed Changes to the Model Act*: Changes have been made to parallel ORS Chapter 60.

(2) *Effective Changes from Chapter 61 Provisions*: Current law has no comparable provision. The closest provision, ORS 61.940, applies primarily to preincorporation transactions.

(3) *Relationship to the Oregon Business Corporation Act*: The statute as enacted is substantively identical to ORS 60.151(2), substituting “member” for “shareholder.”

(4) *Other Comments*: ORS 61.940 derives from the original Model Nonprofit Corporation Act § 11 but omits the last sentence of § 11, which reads: “The directors, officers, employees and members of the corporation shall not, as such, be liable on its obligations.” The Revised Model Act derives from California Nonprofit Corporation Law §§ 5050(a) (public benefit), 7350(a) (mutual benefit), and 9350(a) (religious).

65.154 MEMBER’S LIABILITY FOR DUES, ASSESSMENTS AND FEES

A member may become liable to the corporation for dues, assessments or fees. An article or bylaw provision or a resolution adopted by the board authorizing or imposing dues, assessments or fees does not, of itself, create liability to pay the obligation, but nonpayment may constitute grounds for expelling or suspending the member or suspending or terminating the membership. [1989 c.1010 § 45]

OFFICIAL COMMENT TO ORS 65.154 (MODEL ACT § 6.13)

(1) *Proposed Changes to the Model Act*: An increase in dues, assessments or fees to which a member has not consented is grounds for loss of membership. Continued membership can be conditioned upon payment of such obligations.

(2) *Effective Changes from Chapter 61 Provisions*: Under current law, the corporation's power to impose dues, assessments and fees is not spelled out but is presumably a general power under ORS 61.061. The proposal establishes that members may become liable to the corporation, although not through unilateral action of the corporation. As with ORS 65.144, Model Act § 6.10, this presupposes that membership is a bilateral relationship. Members should not become liable for dues without their consent. Amending articles and bylaws should not be enough to impose liability for increased or new dues, or assessments.

(3) *Relationship to the Oregon Business Corporation Act*: ORS 60.147(4) provides that once the consideration for shares is received by the corporation, shares are fully paid and non-assessable. ORS 60.151(1) provides that a purchaser of shares is not liable to the corporation except to pay for the shares.

(4) *Other Comments*: This provision derives from California Nonprofit Corporation Law §§ 5351 (public benefit), 7351 (mutual benefit), and 9351 (religious).

There is potential contract liability of members who agree to pay fees and assessments regardless of increases. In such a situation the corporation would have a claim for breach of contract against a member who refused to pay. Absent such a prior agreement, the remedy of the corporation is probably limited to termination of the membership, expulsion or suspension. The procedure for expelling or suspending a member is in ORS 65.167, Model Act § 6.21.

65.157 CREDITOR'S ACTION AGAINST MEMBER

(1) No proceeding may be brought by a creditor to reach the liability, if any, of a member to the corporation arising from membership unless final judgment has been rendered in favor of the creditor against the corporation and execution has been returned unsatisfied in whole or in part or unless obtaining such judgment and execution would be useless.

(2) All creditors of the corporation, with or without reducing their claims to judgment, may intervene in any creditor's proceeding brought under subsection (1) of this section to reach and apply unpaid amounts due the corporation. Any or all members who owe amounts to the corporation arising from membership may be joined in such proceeding. [1989 c.1010 § 46]

OFFICIAL COMMENT TO ORS 65.157 (MODEL ACT § 6.14)

(1) *Proposed Changes to the Model Act*: The protection of members against creditors' actions applies only to obligations arising from membership. This clarifies that arms-length liabilities not arising out of membership are not covered. An ambiguity in the term "proceeding" has been corrected. An action against a member is permitted only if the attempt to obtain satisfaction from the corporation would be useless. This section is not intended to excuse creditors from obtaining a final judgment against the corporation because they believe the judgment would be useless.

(2) *Effective Changes from Chapter 61 Provisions*: This new provision protects a member from a creditor's action if the corporation has sufficient assets to meet the obligation. It does not alter current law regarding piercing the corporate veil.

(3) *Relationship to the Oregon Business Corporation Act*: ORS Chapter 60 has no comparable provision.

(4) *Other Comments*: This provision derives from California Nonprofit Corporation Law §§ 5352 (public benefit), 7353 (mutual benefit), and 9352 (religious). This section is intended to complement rather than displace general rules of civil and bankruptcy procedure.

(RESIGNATION AND TERMINATION)

65.164 RESIGNATION

(1) A member may resign at any time.

(2) The resignation of a member does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made prior to resignation. [1989 c.1010 § 47]

OFFICIAL COMMENT TO ORS 65.164 (MODEL ACT § 6.20)

(1) *Proposed Changes to the Model Act*: None.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal establishes that the corporation cannot prevent a member from resigning, but the member cannot escape liabilities by doing so.

(3) *Relationship to the Oregon Business Corporation Act*: No comparable provision.

(4) *Other Comments*: The power of a member to resign is the

counterpart of ORS 65.131(2), Model Act § 6.01(b), which requires consent of a person for admission to membership. While resignation will not relieve a member of liabilities arising prior to resignation, the existence of the liabilities to third-parties is governed by ORS 65.151 and 65.154, Model Act §§ 6.12 and 6.13. This provision derives from California Nonprofit Corporation Law §§ 5340 (public benefit), 7340 (mutual benefit), and 9340 (religious).

65.167 TERMINATION, EXPULSION OR SUSPENSION

(1) **No member of a public benefit or mutual benefit corporation may be expelled or suspended, and no membership or memberships in such corporations may be terminated or suspended except pursuant to a procedure which is fair and reasonable and is carried out in good faith.**

(2) **A procedure is fair and reasonable when either:**

(a) **The articles or bylaws set forth a procedure which provides:**

(A) **Not less than 15 days' prior written notice of the expulsion, suspension or termination and the reasons therefor; and**

(B) **An opportunity for the member to be heard, orally or in writing, not less than five days before the effective date of the expulsion, suspension or termination by a person or persons authorized to decide that the proposed expulsion, termination or suspension not take place; or**

(b) **It is fair and reasonable taking into consideration all of the relevant facts and circumstances.**

(3) **Any written notice given by mail must be given by first class or certified mail sent to the last address of the member shown on the corporation's records.**

(4) **Any proceeding challenging an expulsion, suspension or termination, including a proceeding in which defective notice is alleged, must be commenced within one year after the effective date of the expulsion, suspension or termination.**

(5) **A member who has been expelled or suspended, or whose membership has been suspended or terminated, may be liable to the corporation for dues, assessments or fees as a result of obligations incurred by the member prior to expulsion, suspension or termination. [1989 c.1010 § 48]**

OFFICIAL COMMENT TO ORS 65.167 (MODEL ACT § 6.21)

(1) *Proposed Changes to the Model Act:* ORS 65.167(2)(a)(A) corrects a grammatical error in Model Act § 6.21(b)(1)(i). Subsection (5) sharpens the language of Model Act § 6.21(e) and expands it to cover suspension or termination of membership, in order to parallel the other subsections.

(2) *Effective Changes from Chapter 61 Provisions:* Because current law has no provision, a contest might arise over the power of a corporation to expel or suspend a member or suspend or terminate a membership. The proposal is intended to codify the requirements judicially developed in other jurisdictions.

(3) *Relationship to the Oregon Business Corporation Act:* No comparable provision.

(4) *Other Comments:* This provision derives from California Nonprofit Corporation Law §§ 5341 (public benefit) and 7341 (mutual benefit).

65.171 ACQUIRING MEMBERSHIPS

(1) **A public benefit or religious corporation may not acquire for value any of its memberships or any right arising therefrom, unless the member is a public benefit or religious corporation.**

(2) **A mutual benefit corporation may acquire the membership of a member who resigns or whose membership is terminated for the amount and pursuant to the conditions set forth in or authorized by its articles or bylaws.**

(3) **No acquisition of memberships shall be made in violation of ORS 65.551 or 65.554. [1989 c.1010 § 49]**

OFFICIAL COMMENT TO ORS 65.171 (MODEL ACT § 6.22)

(1) *Proposed Changes to the Model Act:* The proposal permits acquiring a membership in a public benefit or religious corporation if the member itself is a public benefit or religious corporation. This change parallels one in ORS 65.147(2) as compared with Model Act § 6.11(b), regarding transfers of membership for value. If a membership may be acquired only by a corporation that is subject to the same restrictions that apply to the original corporation, the membership should not be viewed as a "security" that is bought and sold for profit. The last sentence of the section, which is a reminder that

acquisition of memberships cannot violate the limitations on distributions, is expanded to cover the entire section.

The term “purchase” has negative connotations for tax-exempt nonprofits. The term may make it appear to some that nonprofits are buying and selling shares like business corporations, although this would not be the case. Accordingly, the proposal replaces the term “purchase” with the term “acquire for value” throughout the section.

(2) *Effective Changes from Chapter 61 Provisions*: ORS 61.165 restricts dividends and payments of income to members but does not speak directly to purchase of memberships. The proposal distinguishes between memberships in public benefit or religious corporations, which may not be purchased except in limited circumstances, and memberships in mutual benefit corporations, which may be purchased more generally.

(3) *Relationship to the Oregon Business Corporation Act*: ORS 60.177, governing a business corporation’s acquisition of its own shares, is a distant cousin.

(4) *Other Comments*: The proposal is connected with ORS 65.147(2), Model Act § 6.11(b), prohibiting transfer for value of membership in a public benefit or religious corporation, and ORS 65.554, Model Act § 13.02, restricting distributions. Subsection (2) derives from California Nonprofit Corporation Act § 7332.

(DERIVATIVE SUITS)

65.174 DERIVATIVE SUITS

(1) A proceeding may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor by:

(a) Any member or members having two percent or more of the voting power or by 20 members, whichever is less; or

(b) Any director.

(2) In any such proceeding, each member complainant shall have been a member when the transaction complained of occurred.

(3) A complaint in a proceeding brought in the right of a corporation must allege with particularity the demand made, if any, to obtain action by the board of directors and either that the demand was refused or ignored or why a demand was not made. Whether or not a demand for action was made, if the corporation commences an

investigation of the charges made in the demand or complaint, the court may stay any proceeding until the investigation is completed.

(4) The complainants shall notify the Attorney General within 10 days after commencing any proceeding under this section if the proceeding involves a public benefit corporation or assets held in charitable trust by a mutual benefit corporation.

(5) A proceeding commenced under this section may not be discontinued or settled without the court’s approval. If the court determines that a proposed discontinuance or settlement will substantially affect the interest of the corporation’s members or a class of members, the court shall direct that notice be given the members affected. [1989 c.1010 § 50]

OFFICIAL COMMENT TO ORS 65.174 (MODEL ACT § 6.30)

(1) *Proposed Changes to the Model Act*: The standing thresholds in subsection (1) have been reduced to two percent or 20 members. Changes have been made in subsections (2) and (3) to parallel ORS 60.261(1) and (2). Because subsection (2) has been altered to refer to the time the transaction occurred, reference to directors has been dropped. New subsection (5) parallels ORS 60.261(3).

Because ORS 60.261 omitted a provision for expenses for defending against frivolous suits, the proposal omits the comparable subsection of the Model Act. Model Act subsection (e) has also been omitted, since it could unduly encourage derivative proceedings.

Because of the broader definition of “member,” the right to bring a derivative suit is not necessarily limited to members with the right to vote for directors.

(2) *Effective Changes from Chapter 61 Provisions*: While Oregon has no general statutory provision for members’ derivative actions in the right of a nonprofit corporation, a court would likely recognize such an action. ORS 65.174, Model Act § 6.30, would codify the procedure for derivative suits; it would not create authority for a suit that would be unavailable absent the statute. Requiring two percent or more of the voting power of the membership to bring a derivative action would be a threshold test that would minimize the problem of nuisance suits but is not an insuperable barrier for plaintiffs.

The courts of at least five states — New Jersey, New York, Delaware, Louisiana, and Tennessee — have allowed derivative suits by

the members of nonprofit corporations even in the absence of a specific statute. At least one case has recognized the right of non-voting members to bring a derivative suit. At least two states — Washington and Colorado — have allowed derivative suits by stockholders of nonprofit mutual benefit corporations, in those cases water supply corporations.

Commentators recommend extending the remedy of a derivative action to members of nonprofit corporations. They indicate that while statutes may regulate and occasionally preempt the common law action, a statute has never been thought necessary in order to authorize a derivative action. Indeed, the derivative suit predated derivative suit statutes.

ORS Chapter 61 has no general provision governing derivative actions involving nonprofit corporations. However, ORS 61.065(2) authorizes “members in a representative suit” to bring “a proceeding by the corporation” to assert *ultra vires* against present or former officers or directors. ORS 61.205(2), which authorizes indemnity in an “action or suit by or in the right of the corporation,” implies the possibility of a derivative suit.

(3) *Relationship to the Oregon Business Corporation Act*: ORS 60.261 now governs shareholders’ derivative proceedings in the right of business corporations. Prior to 1987, Oregon had no statute on derivative proceedings. Indeed, Oregon was the only state that had neither a procedural nor a substantive statute governing derivative proceedings for general business corporations.

Despite lack of a statute, Oregon had developed a fairly extensive jurisprudence of shareholder derivative proceedings. The Oregon courts appear to view the derivative proceeding as an equitable action that does not require statutory creation.

Subsections (2), (3), and (5) of the proposal are similar to ORS 60.261. Chapter 60 has no counterpart to subsections (1) (standing to bring derivative suit) or (4) (notice to attorney general). In contrast to ORS 60.261(1), paragraph (1)(b) grants directors standing to bring a derivative suit.

(4) *Other Comments*: The Oregon Rules of Civil Procedure have no provision on derivative suits. The Federal Rules of Civil Procedure specifically apply to a derivative action brought by members. FRCP 23.1. The federal rule assumes that members’ derivative actions are on par with shareholders’ derivative actions.

Because Attorney General enforcement is available against charitable corporations, one might query whether members’ derivative suits are also needed. In fact, members’ derivative actions have been allowed even in cases where the Attorney General or some other party may have standing to sue. Concurrent standing makes sense because even with a charitable corporation, the injury to the corporation of which the members complain through a derivative suit may not be a breach of charitable trust that the Attorney General would pursue.

(DELEGATES)

65.177 DELEGATES

(1) A corporation may provide in its articles or bylaws for delegates having some or all of the authority of members.

(2) The articles or bylaws may set forth provisions relating to:

(a) The characteristics, qualifications, rights, limitations and obligations of delegates including their selection and removal;

(b) Providing notice to and calling, holding and conducting meetings of delegates; and

(c) Carrying on corporate activities during and between meetings of delegates. [1989 c.1010 § 51]

OFFICIAL COMMENT TO ORS 65.177 (MODEL ACT § 6.40)

(1) *Proposed Changes to the Model Act*: None.

(2) *Effective Changes from Chapter 61 Provisions*: No comparable provision. The purpose of this section is to give statutory credibility to a category presently used by a number of nonprofit corporations. Delegates typically represent discrete interests and often have some or all of the authority of members.

(3) *Relationship to the Oregon Business Corporation Act*: No comparable provision.

(4) *Other Comments*: This provision derives from California Nonprofit Corporation Law §§ 5152 (public benefit), 7152 (mutual benefit), and 9152 (religious).

MEMBERS MEETINGS AND VOTING

(MEETINGS AND ACTION WITHOUT MEETINGS)

65.201 ANNUAL AND REGULAR MEETINGS

(1) A corporation with members shall hold a membership meeting annually at a time stated in or fixed in accordance with the bylaws.

(2) A corporation with members may hold regular membership meetings at the times stated in or fixed in accordance with the bylaws.

(3) Annual and regular membership meetings may be held in or out of this state at the place stated in or fixed in accordance with the bylaws. If no place is stated in or fixed in accordance with the bylaws, annual and regular meetings shall be held at the corporation's principal office.

(4) At the annual meeting:

(a) The president, and any other officer the board of directors or the president may designate, shall report on the activities and financial condition of the corporation; and

(b) The members shall consider and act upon such other matters as may be raised consistent with the notice requirements of ORS 65.214.

(5) At regular meetings the members shall consider and act upon such matters as may be raised consistent with the notice requirements of ORS 65.214.

(6) The failure to hold an annual or regular meeting at a time stated in or fixed in accordance with a corporation's bylaws does not affect the validity of any corporate action. [1989 c.1010 § 52]

OFFICIAL COMMENT TO ORS 65.201 (MODEL ACT § 7.01)

(1) *Proposed Changes to the Model Act:* In subsection (4)(a), only the president is required to report at the annual meeting, whereas the Model Act requires the president and the chief financial officer to report. The reporting requirement for the chief financial officer has been dispensed with because many nonprofit corporations either have no such officer or may prefer that others (including the president) make reports. The revised text allows the board of directors or the president to authorize or designate other officers to

report. The information to be reported is more important than the office held by the person giving the report.

(2) *Effective Changes from Chapter 61 Provisions:* The proposal adds the Model Act concept of regular meetings and spells out in further detail the matters that should be attended to at annual and regular meetings.

ORS 61.101 provided that the failure to hold the annual meeting at the designated time does not work a forfeiture or dissolution of the corporation. The approach in the proposal is to indicate that failure to hold annual or regular meetings timely does not affect the validity of any corporate action.

The proposal supplants the final sentences of ORS 61.101(2) which authorize the president, the board of directors, or five percent of the members to call for an annual meeting that has not been held at the designated time. The proposal retains such authority under ORS 65.204, Model Act § 7.02 (special meetings), and judicial relief is available under ORS 65.038 and 65.207, Model Act §§ 1.60 and 7.03.

(3) *Relationship to the Oregon Business Corporation Act:* Generally parallels ORS 60.201. The proposal omits provision for telephonic meetings (the Business Corporation Act Amendments proposal for inclusion in ORS 60.201 to 60.221). Few nonprofit corporations have the small number of members that would make such a provision useful.

65.204 SPECIAL MEETING

(1) A corporation with members shall hold a special meeting of members:

(a) On call of its board of directors or the person or persons authorized to do so by the articles of incorporation or bylaws; or

(b) Except as provided in the articles or bylaws, if the holders of at least five percent of the voting power of any corporation sign, date and deliver to the corporation's secretary one or more written demands for the meeting describing the purpose or purposes for which it is to be held.

(2) If not otherwise fixed under ORS 65.207 or 65.221, the record date for members entitled to demand a special meeting is the date the first member signs the demand.

(3) If a notice for a special meeting demanded under paragraph

(b) of subsection (1) of this section is not given pursuant to ORS 65.214 within 30 days after the date the written demand or demands are delivered to the corporation's secretary then, regardless of the requirements of subsection (4) of this section, a person signing the demand or demands may set the time and place of the meeting and give notice pursuant to ORS 65.214.

(4) Special meetings of members may be held in or out of this state at the place stated in or fixed in accordance with the bylaws. If no place is stated or fixed in accordance with the bylaws, special meetings shall be held at the corporation's principal office.

(5) Only matters within the purpose or purposes described in the meeting notice required by ORS 65.214 may be conducted at a special meeting of members. [1989 c.1010 § 53]

OFFICIAL COMMENT TO ORS 65.204 (MODEL ACT § 7.02)

(1) *Proposed Changes to the Model Act:* In subsection (1)(b), the ability of *all* nonprofit corporations (*i.e.*, both religious and other) to specify in their articles or bylaws the number or proportion of members entitled to call a meeting is expanded as compared to the Model Act. Where no such provision is made, the holders of at least five percent of the votes entitled to be cast on any issues proposed to be considered must make the written demand. This approach derives from the proposed change in the definition of the term "member" as compared with the Model Act and adopts more closely the approach taken in Chapter 60 when defining who must make the demand. A slight variation from the Model Act is the specification of the corporation's secretary (rather than *any* corporate officer) as the person to whom the written demand must be delivered.

(2) *Effective Changes from Chapter 61 Provisions:* The proposal liberalizes the ability of the corporation to make special provision for the persons entitled to call a special meeting. The proposal requires what probably is implied in ORS 61.105(1), namely, that only matters specified in the notice be acted upon at a special meeting.

(3) *Relationship to the Oregon Business Corporation Act:* The proposal parallels ORS 60.204(1). The proposal also tracks more closely than the Model Act the provisions of ORS 60.204(2) with respect to the determination of the record date. On the other hand,

the proposal follows the Model Act approach of allowing the persons signing the demand to set the time and place of the meeting where a notice for a special meeting is not given within 30 days after the date of the demand.

65.207 COURT-ORDERED MEETING

(1) The circuit court of the county where a corporation's principal office is located, or, if the principal office is not in this state, where the registered office of the corporation is or was last located, may summarily order a meeting to be held:

(a) On application of any member or other person entitled to participate in an annual or regular meeting or, in the case of a public benefit corporation, the Attorney General, if an annual meeting was not held within the earlier of six months after the end of the corporation's fiscal year or 15 months after its last annual meeting;

(b) On application of any member or other person entitled to participate in a regular meeting or, in the case of a public benefit corporation, the Attorney General, if a regular meeting is not held within 40 days after the date it was required to be held; or

(c) On application of a member who signed a demand for a special meeting valid under ORS 65.204, a person or persons entitled to call a special meeting or, in the case of a public benefit corporation, the Attorney General, if notice of the special meeting was not given within 30 days after the date the demand was delivered to the corporation's secretary or the special meeting was not held in accordance with the notice.

(2) The court may fix the time and place of the meeting, determine the members entitled to participate in the meeting, specify a record date for determining members entitled to notice of and to vote at the meeting, prescribe the form and content of the meeting notice, fix the quorum required for specific matters to be considered at the meeting or direct that the votes represented at the meeting constitute a quorum for action on those matters, and enter other orders necessary to accomplish the purpose or purposes of the meeting.

(3) If the court orders a meeting, it may also order the corporation to pay the member's costs, including reasonable attorney fees, incurred to obtain the order.

(4) The request shall be set for hearing at the earliest possible

time and shall take precedence over all matters, except matters of the same character and hearings on preliminary injunctions under ORCP 79 B.(3). No order shall be issued by the court under this section without notice to the corporation at least five days in advance of the time specified for the hearing unless a different period is fixed by order of the court. [1989 c.1010 § 54]

OFFICIAL COMMENT TO ORS 65.207 (MODEL ACT § 7.03)

(1) *Proposed Changes to the Model Act*: In subsections (1)(a), (b), and (c), “and” has been changed to “or” to express the intended meaning correctly. In subsection (2), in addition to the power specified in the Model Act, the court is further authorized to “determine the members entitled to participate in the meeting.” In subsection (4), the provision for costs and attorneys’ fees is deleted and the provision set forth in ORS 60.207(3) (referring to ORCP 79 B.(3)) is substituted in its place.

(2) *Effective Changes from Chapter 61 Provisions*: This is a new provision without a counterpart in Chapter 61.

(3) *Relationship to the Oregon Business Corporation Act*: This provision parallels ORS 60.207.

65.211 ACTION WITHOUT MEETING

(1) Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by this chapter to be taken at a members’ meeting may be taken without a meeting if the action is taken by all the members entitled to vote on the action. The action must be evidenced by one or more written consents describing the action taken, signed by all the members entitled to vote on the action, and delivered to the corporation for inclusion in the minutes or filing with the corporate records. Action taken under this section is effective when the last member signs the consent, unless the consent specifies an earlier or later effective date.

(2) If not otherwise determined under ORS 65.207 or 65.221, the record date for determining members entitled to take action without a meeting is the date the first member signs the consent under subsection (1) of this section.

(3) A consent signed under this section has the effect of a meeting vote and may be described as such in any document. [1989 c.1010 § 55]

OFFICIAL COMMENT TO ORS 65.211 (MODEL ACT § 7.04)

(1) *Proposed Changes to the Model Act*: The initial phrase has been conformed to ORS 65.341(1), Model Act § 8.21(a). The language of the Model Act that refers to action “to be approved” by the members has been changed to conform to the approach used in ORS 61.935 and ORS 60.211, namely, action “to be taken at a members’ meeting.” The proposal also follows the approach of the last sentence of ORS 60.211(1) in providing that action is effective when the last member signs the consent, unless the consent specifies an earlier or later effective date.

The proposal carries forward prior Oregon law that requires unanimous action rather than action by at least 80% of the voting power as provided in the Model Act. Nonprofit corporations often have many members, and unanimous consent might be difficult to obtain simply because of the numbers involved. If unanimous consent is unattainable, an option is a ballot mailed to members as a substitute for a meeting.

The proposal also eliminates from subsection (3) the provision in Model Act subsection (c) that refers to documents “filed with the Secretary of State.” A similar approach is taken in ORS 60.211(3).

The proposal omits the provision of the Model Act in subsection (d) requiring notice to members who have not signed the consent. This is appropriate because the proposal opts for unanimous consent rather than 80% or greater approval.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal follows generally the provisions of ORS 61.935, but with the further elaboration set forth in ORS 60.211. As under current law, notice is not required to be given to members who lack voting power.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal parallels ORS 60.211 but omits ORS 60.211(4), which requires notice to shareholders without voting power. The articles or bylaws may limit or prohibit members’ authority to act without a meeting.

65.214 NOTICE OF MEETING

(1) A corporation shall give notice consistent with its bylaws of meetings of members in a fair and reasonable manner. The corporation is required to give notice to members entitled to vote at the

meeting and to any other person specified in this chapter, the articles of incorporation or the bylaws.

(2) Any notice which conforms to the requirements of subsection (3) of this section is fair and reasonable, but other means of giving notice may also be fair and reasonable when all the circumstances are considered, provided, however, that notice of matters referred to in paragraph (b) of subsection (3) of this section must be given as provided in subsection (3) of this section.

(3) Notice is fair and reasonable if:

(a) The corporation notifies its members of the place, date and time of each annual, regular and special meeting of members no fewer than seven days, or if notice is mailed by other than first class or registered mail, no fewer than 30 nor more than 60 days before the meeting;

(b) Notice of an annual or regular meeting includes a description of any matter or matters which must be approved by the members under ORS 65.361, 65.404, 65.414 (1)(a), 65.437, 65.464, 65.487, 65.534 or 65.624; and

(c) Notice of a special meeting includes a description of the purpose or purposes for which the meeting is called.

(4) Unless the bylaws require otherwise, if an annual, regular or special meeting of members is adjourned to a different date, time or place, notice need not be given of the new date, time or place, if the new date, time or place is announced at the meeting before adjournment. If a new record date for the adjourned meeting is or must be fixed under ORS 65.221, however, notice of the adjourned meeting must be given under this section to the persons who are members as of the new record date. [1989 c.1010 § 56; 1991 c.231 § 2]

OFFICIAL COMMENT TO ORS 65.214 (MODEL ACT § 7.05)

(1) *Proposed Changes to the Model Act:* Subsection (1) is modified to follow existing law in requiring notice only to members entitled to vote. The articles of incorporation or bylaws may require notice to non-voting members. Because "matters" are individual items on which a vote may be taken (*see* ORS 65.227(1), Model Act § 7.21(a)), subsection (3)(c) refers to notice of "purposes." The wording in subsection (4) follows 60.214(5). Model Act § 7.05(e), allowing members to place items on the agenda for a meeting, has been omitted.

(2) *Effective Changes from Chapter 61 Provisions:* The safe harbor notice requirements generally follow ORS 61.105(1) except that further specificity is required in the notice of regular meetings of members. Also, rules are provided that do not appear in Chapter 61 for the notice of adjourned meetings.

Under current law, seven days notice is required, and a mailbox rule applies, whatever the class of mail used. Under the proposal, the "mailbox rule" continues in ORS 65.034(3), but the deadlines are extended and classes of mail are distinguished. Under ORS 65.034(5) and 65.214(3)(a), Model Act §§ 1.41(a) and 7.05(c)(1), mailed notice is to be placed in the mail no fewer than seven days before the meeting date if mailed by first-class or registered mail, and 30 days if mailed otherwise. Many nonprofits use bulk mailing which could take longer than seven days to be delivered.

Under the proposal, notice must be fair and reasonable. The notice provisions of ORS 61.105(2) and (3) are examples of fair and reasonable notice by publication.

Subsection (4) adopts the approach of ORS 60.214(4). This provision specifies a record date unless one is otherwise fixed under ORS 65.207 or 65.221, Model Act §§ 7.03 or 7.07.

(3) *Relationship to the Oregon Business Corporation Act:* The proposal generally follows ORS 60.214, except that it adopts a more liberal standard for "fair and reasonable" notice as proposed by the Model Act for nonprofit corporations. A ten-day notice rule is provided for in Chapter 60.

OFFICIAL COMMENT TO 1991 LEGISLATIVE AMENDMENT

The changes correct errors in cross-references.

65.217 WAIVER OF NOTICE

(1) **A member may at any time waive any notice required by this chapter, the articles or bylaws. The waiver must be in writing, be signed by the member entitled to the notice and be delivered to the corporation for inclusion in the minutes or filing with the corporate records.**

(2) **A member's attendance at a meeting waives objection to:**

(a) **Lack of notice or defective notice of the meeting, unless the member at the beginning of the meeting objects to holding the meeting or transacting business at the meeting; and**

(b) Consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the member objects to considering the matter when it is presented. [1989 c.1010 § 57]

OFFICIAL COMMENT TO ORS 65.217 (MODEL ACT § 7.06)

(1) *Proposed Changes to the Model Act*: The proposal generally follows the provisions of the Model Act, except for minor wording changes.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal is similar to ORS 61.930, but adds provisions regarding the effect of a member's attendance at a meeting with respect to the right to object to business transacted at the meeting.

(3) *Relationship to the Oregon Business Corporation Act*: The provision generally follows ORS 60.217.

(4) *Other Comments*: A member who objects to the meeting under subsection (2)(a) should not be counted towards the quorum or in voting, and a member who objects to consideration of a matter under (2)(b) should not be counted in the voting.

65.221 RECORD DATE

(1) The bylaws may fix or provide the manner of fixing the record date in order to determine the members entitled to notice of a members' meeting, to demand a special meeting, to vote or to take any other lawful action. If the bylaws do not fix or provide for fixing such a record date, the board of directors may fix a future date as the record date. If no such record date is fixed, then:

(a) To determine the members entitled to notice of a members' meeting, the record date shall be the day before the day on which first notice is mailed or otherwise transmitted to members in accordance with ORS 65.034, or if notice is waived, the day preceding the day on which the meeting is held.

(b) To determine the members entitled to demand a special meeting, the record date shall be as set forth in ORS 65.204 (2).

(c) To determine the members entitled to take action without a meeting, the record date shall be as set forth in ORS 65.211 (2).

(d) To determine the members entitled to vote at a members' meeting, the record date shall be the date of the meeting.

(e) To determine the members entitled to exercise any rights in

respect to any other lawful action, the record date shall be the day on which the board adopts the resolution relating thereto, or the 60th day prior to the date of such other action, whichever is later.

(2) A record date fixed under this section may not be more than 70 days before the meeting or action requiring the determination of members.

(3) A determination of members entitled to notice of or to vote at a membership meeting is effective for any adjournment of the meeting unless the board fixes a new record date, which it must do if the meeting is adjourned to a date more than 120 days after the date fixed for the original meeting.

(4) If a court orders a meeting adjourned to a date more than 120 days after the date fixed for the original meeting, it may provide that the original record date continues in effect or it may fix a new record date. [1989 c.1010 § 58]

OFFICIAL COMMENT TO ORS 65.221 (MODEL ACT § 7.07)

(1) *Proposed Changes to the Model Act*: The proposal follows the structural approach used in ORS 60.221 for determining the record date. Accordingly, the provisions of Model Act §§ 7.07(b) and (c) (regarding the record date for determining members entitled to vote and members entitled to exercise other rights) have been moved into the operative provisions elsewhere in the proposal as appropriate. Subsection (1) includes cross-references, so that it furnishes a comprehensive list of record date provisions.

The provision in subsection (3) provides for a 120-day period before which an adjourned meeting requires a new record date. This approach is consistent with ORS 60.221(3). Subsection (1)(a) has been amended to conform to amendments to ORS 60.214(4) proposed for the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions*: ORS Chapter 61 contains no record date provisions. The addition of record date provisions should increase certainty in taking corporate actions and, therefore, is desirable. The concept of record date tells when to take a snapshot of the members entitled to take any particular actions. Even if nonprofit corporations do not routinely use the concept of record date, that concept will allow them to decide definitely when to count the members.

(3) *Relationship to the Oregon Business Corporation Act*: The

provision generally follows ORS 60.221, except that the proposal sets forth a default record date where one is not otherwise determined. If the board of directors or the bylaws do not set the record date, the record date will be fixed in accordance with the applicable subparagraph of subsection (1). ORS Chapter 60 does not contain provisions that describe how a record date will be fixed if the board or the bylaws fail to fix the date. Such a provision is needed for nonprofit corporations, many of which are unfamiliar with the concept of record date.

65.222 ACTION BY WRITTEN BALLOT

(1) Unless prohibited or limited by the articles or bylaws, any action which may be taken at any annual, regular or special meeting of members may be taken without a meeting if the corporation delivers a written ballot to every member entitled to vote on the matter.

(2) A written ballot shall:

- (a) Set forth each proposed action; and
- (b) Provide an opportunity to vote for or against each proposed action.

(3) Approval by written ballot pursuant to this section shall be valid only when the number of votes cast by ballot equals or exceeds any quorum required to be present at a meeting authorizing the action, and the number of approvals equals or exceeds the number of votes that would be required to approve the matter at a meeting at which the total number of votes cast was the same as the number of votes cast by ballot.

(4) All solicitations for votes by written ballot shall:

- (a) Indicate the number of responses needed to meet the quorum requirements;
- (b) State the percentage of approvals necessary to approve each matter other than election of directors; and
- (c) Specify a reasonable time by which a ballot must be received by the corporation in order to be counted.

(5) Except as otherwise provided in the articles or bylaws, a written ballot may not be revoked. [1989 c.1010 § 59]

OFFICIAL COMMENT TO ORS 65.222 (MODEL ACT § 7.08)

(1) *Proposed Changes to the Model Act*: Subsection (c) is

changed because the proposed act has no minimum quorum. See ORS 65.241(1), departing from Model Act § 7.22(a). Subsection (4)(c) requires a reasonable amount of time for return of ballots. Consistent with the norm in ORS 65.214(3)(a) of seven days notice of members' meeting, a reasonable time for return of ballots might be at least seven days after delivery or seventeen days after mailing.

(2) *Effective Changes from Chapter 61 Provisions*: No detailed procedures exist in ORS Chapter 61, although ORS 61.111(2) contains a provision for voting upon the election of directors or officers by mail if the bylaws so provide.

(3) *Relationship to the Oregon Business Corporation Act*: No parallel provision.

(4) *Other Comments*: This section is intended to simplify and to codify existing practice.

(VOTING)

65.224 MEMBERS' LIST FOR MEETING

(1) A corporation shall prepare an alphabetical list of the names, addresses and membership dates of all its members. If there are classes of members, the list must show the address and number of votes each member is entitled to vote at the meeting. The corporation shall prepare on a current basis through the time of the membership meeting a list of members, if any, who are entitled to vote at the meeting, but are not part of the main list of members.

(2) The list of members must be available for inspection by any member for the purpose of communication with other members concerning the meeting, beginning two business days after notice of the meeting is given for which the list was prepared and continuing through the meeting, at the corporation's principal office or at a reasonable place identified in the meeting notice in the city or other location where the meeting will be held. A member, the member's agent or attorney is entitled, on written demand setting forth a proper purpose, to inspect and, subject to the requirements of ORS 65.774 and 65.782, to copy the list at a reasonable time and at the member's expense, during the period it is available for inspection.

(3) The corporation shall make the list of members available at the meeting, and any member, the member's agent or attorney is entitled to inspect the list for any proper purpose at any time during the meeting or any adjournment.

(4) If the corporation refuses to allow a member, the member's agent or attorney to inspect the list of members before or at the meeting or copy the list as permitted by subsection (2) of this section, on application of the member, the circuit court of the county where the corporation's principal office, or if the principal office is not in this state, where its registered office is or was last located, may enter a temporary restraining order or preliminary injunction pursuant to ORCP 79 ordering the inspection or copying at the corporation's expense and may postpone the meeting for which the list was prepared until the inspection or copying is complete and may order the corporation to pay the member's costs, including reasonable attorney fees, incurred to obtain the order. The party initiating such a proceeding shall not be required to post an undertaking pursuant to ORCP 82 A.

(5) Refusal or failure to prepare or make available the membership list does not affect the validity of action taken at the meeting.

(6) The articles or bylaws of a religious corporation may limit or abolish the rights of a member under this section to inspect and copy any corporate record.

(7) The articles of a public benefit corporation organized primarily for political or social action, including but not limited to political or social advocacy, education, litigation or a combination thereof, may limit or abolish the right of a member or the members' agent or attorney to inspect or copy the membership list if the corporation provides a reasonable means to mail communications to the other members through the corporation at the expense of the member making the request. [1989 c.1010 § 60]

OFFICIAL COMMENT TO ORS 65.224 (MODEL ACT § 7.20)

(1) *Proposed Changes to the Model Act*: The proposal generally follows the Model Act. There are minor wording changes to parallel ORS 60.224.

The list-keeping requirements of subsection (1) have been simplified, since many nonprofit organizations do not keep current records of their members. The membership date will allow determining who was a member as of a record date, but the corporation need not keep a list of which members were entitled to notice of a meeting.

Nonprofit corporations should be able to keep their membership

list confidential to prevent harassment of members or commercial use of the list. As under current law, this section limits access to the members list to those who can demonstrate a proper purpose for inspecting the list. A special provision that goes beyond the Model Act has been added that allows political advocacy and social action public benefit corporations, by amending their articles, to limit or abolish member access to the list where a reasonable means of mailing communications to other members exists.

In subsection (5) validity of an action at a meeting is preserved without regard to a written demand and improper refusal. This section was revised to provide that the refusal or failure to prepare or make available the membership list does not invalidate corporate action. The Model Act makes such a refusal or failure potential grounds for invalidation.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal would expand upon and provide greater certainty than the corresponding provisions in ORS 61.161. The requirement in subsection (1) that the membership list contain dates of membership will permit determining who the members were as of any record date.

(3) *Relationship to the Oregon Business Corporation Act*: The provision substantially follows the shareholder list provisions in ORS 60.224.

65.227 VOTING ENTITLEMENT OF MEMBERS

(1) Unless the articles or bylaws provide otherwise, each member is entitled to one vote on each matter voted on by the members, including each matter on which a member is entitled to vote under this chapter or the articles or bylaws. Except as expressly prohibited in this chapter, the articles or bylaws may provide for different allocations of votes among member classes or exclude the members or some or all member classes from voting on any issue on which they would otherwise be entitled to vote under this chapter. Persons not retaining a right to vote on more than one occasion for the election of a director or directors shall not be deemed members.

(2) Unless the articles or bylaws provide otherwise, if a membership stands of record in the names of two or more persons, their acts with respect to voting shall have the following effect:

(a) If only one votes, such act binds all; and

(b) **If more than one votes, the vote shall be divided on a pro rata basis. [1989 c.1010 § 61; 1991 c.231 § 3]**

OFFICIAL COMMENT TO ORS 65.227 (MODEL ACT § 7.21)

(1) *Proposed Changes to the Model Act: See Official Comment To 1991 Legislative Amendment below.*

(2) *Effective Changes from Chapter 61 Provisions: ORS 61.111(1) contains provisions similar to subsection (1). The provision for membership standing of record in two or more names has no counterpart in ORS Chapter 61.*

(3) *Relationship to the Oregon Business Corporation Act: ORS 60.227 contains a provision similar to subsection (1), and the provisions of ORS 60.234 are essentially analogous to subsection (2).*

OFFICIAL COMMENT TO 1991 LEGISLATIVE AMENDMENT

The third sentence of subsection (1) is a reminder that membership derives from the right to vote on the election of directors. ORS 65.001(22)(a), as amended herein. The additional language in the first sentence clarifies that any person who is a member, by virtue of those voting rights, is entitled to vote on all matters which must be approved by members, unless the articles or bylaws vary members' voting rights. The second sentence recognizes that voting rights may be varied as between classes or partially eliminated. *See ORS 65.144, which accords all members the same voting rights, unless the articles or bylaws have created classes of members.*

65.231 PROXIES

(1) **Unless the articles or bylaws prohibit or limit proxy voting, a member may appoint a proxy to vote or otherwise act for the member by signing an appointment form either personally or by the member's attorney-in-fact.**

(2) **An appointment of a proxy is effective when received by the secretary or other officer or agent authorized to tabulate votes. An appointment is valid for 11 months unless a different period is expressly provided in the appointment form.**

(3) **An appointment of a proxy is revocable by the member.**

(4) **The death or incapacity of the member appointing a proxy does not affect the right of the corporation to accept the proxy's authority unless notice of the death or incapacity is received by the**

secretary or other officer or agent authorized to tabulate votes before the proxy exercises authority under the appointment.

(5) **Appointment of a proxy is revoked by the person appointing the proxy:**

(a) **Attending any meeting and voting in person; or**

(b) **Signing and delivering to the secretary or other officer or agent authorized to tabulate proxy votes either a writing stating that the appointment of the proxy is revoked or a subsequent appointment form.**

(6) **Subject to ORS 65.237 and any express limitation on the proxy's authority appearing on the face of the appointment form, a corporation is entitled to accept the proxy's vote or other action as that of the member making the appointment. [1989 c.1010 § 64]**

OFFICIAL COMMENT TO ORS 65.231 (MODEL ACT § 7.24)

(1) *Proposed Changes to the Model Act: The only substantive change is the deletion from subsection (2) of the limitation on the duration of a proxy. The Model Act limits a proxy to three years from the date of execution, while ORS Chapter 60 has no such limitation.*

(2) *Effective Changes from Chapter 61 Provisions: The proposal provides further detail as to the effect of a proxy and the manner and consequences of revocation. See ORS 61.111(2). Under current nonprofit law, a proxy is limited to 11 months.*

(3) *Relationship to the Oregon Business Corporation Act: The proposal parallels ORS 60.231, except that the provision for revocation, based on the Model Act, has no counterpart in Chapter 60. Subsection (2) has the term "different" where ORS 60.231(3) has the term "longer"; the language of ORS 60.231(3) would appear to preclude appointing a proxy for less than 11 months.*

65.234 ADJOURNMENT

Unless otherwise provided in the articles of incorporation or bylaws, a majority of votes represented at a meeting of members, whether or not a quorum, may adjourn the meeting from time to time to a different time and place without further notice to any member of any adjournment, except as such notice may be required by ORS 65.214(4). At the adjourned meeting at which a quorum is

present, any business may be transacted that might have been transacted at the meeting originally held. [1989 c.1010 § 68]

OFFICIAL COMMENT TO ORS 65.234 (MODEL ACT § (NONE))

(1) *Proposed Changes to the Model Act*: This provision has no counterparts in the Model Act.

(2) *Effective Changes from Chapter 61 Provisions*: This provision has no counterpart in ORS Chapter 61.

(3) *Relationship to the Oregon Business Corporation Act*. This provision parallels the Business Corporation Act Amendment, substituting "member" for "shareholder."

65.237 CORPORATION'S ACCEPTANCE OF VOTES

(1) If the name signed on a vote, consent, waiver or proxy appointment corresponds to the name of a member, the corporation, if acting in good faith, is entitled to accept the vote, consent, waiver or proxy appointment and give it effect as the act of the member.

(2) If the name signed on a vote, consent, waiver or proxy appointment does not correspond to the record name of a member, the corporation if acting in good faith is nevertheless entitled to accept the vote, consent, waiver or proxy appointment and give it effect as the act of the member if:

(a) The member is an entity and the name signed purports to be that of an officer or agent of the entity;

(b) The name signed purports to be that of an attorney-in-fact of the member and if the corporation requests, evidence acceptable to the corporation of the signatory's authority to sign for the member has been presented with respect to the vote, consent, waiver or proxy appointment;

(c) Two or more persons hold the membership as cotenants or fiduciaries and the name signed purports to be the name of at least one of the coholders and the person signing appears to be acting on behalf of all the coholders; or

(d) In the case of a mutual benefit corporation:

(A) The name signed purports to be that of an administrator, executor, guardian or conservator representing the member and, if the corporation requests, evidence of fiduciary status acceptable to the corporation has been presented with respect to the vote, consent, waiver or proxy appointment; or

(B) The name signed purports to be that of a receiver or trustee in bankruptcy of the member, and, if the corporation requests, evidence of this status acceptable to the corporation has been presented with respect to the vote, consent, waiver or proxy appointment.

(3) The corporation is entitled to reject a vote, consent, waiver or proxy appointment if the secretary or other officer or agent authorized to tabulate votes, acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory's authority to sign for the member.

(4) The corporation and its officer or agent who accepts or rejects a vote, consent, waiver or proxy appointment in good faith and in accordance with the standards of this section are not liable in damages to the member for the consequences of the acceptance or rejection.

(5) Corporate action based on the acceptance or rejection of a vote, consent, waiver or proxy appointment under this section is valid unless a court of competent jurisdiction determines otherwise. [1989 c.1010 § 67]

OFFICIAL COMMENT TO ORS 65.237 (MODEL ACT § 7.27)

(1) *Proposed Changes to the Model Act*: None except stylistic.

(2) *Effective Changes from Chapter 61 Provisions*: No counterpart provisions appear in ORS Chapter 61. This section is intended to permit the corporation to use any good faith means in determining whether or not to accept votes.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal parallels ORS 60.237, with special provisions peculiar to nonprofit corporations.

65.241 QUORUM REQUIREMENTS

(1) Unless the articles or bylaws provide for a higher quorum, those votes represented at a meeting of members shall constitute a quorum.

(2) An amendment to the articles or bylaws to decrease the quorum for any member action may be approved by the members, or, unless prohibited by the articles or bylaws, by the board.

(3) An amendment to the articles or bylaws to increase the quo-

rum required for any member action must be approved by the members. [1989 c.1010 § 62]

OFFICIAL COMMENT TO ORS 65.241 (MODEL ACT § 7.22)

(1) *Proposed Changes to the Model Act:* The proposal rejects the Model Act's 10% minimum where no lower number is specified in the articles or bylaws. It also rejects the 1/3 minimum for deviating from the meeting notice at an annual or regular meeting. Since the quorum can be specified in the articles, subsections (2) and (3) refer to amendments to the articles.

(2) *Effective Changes from Chapter 61 Provisions:* ORS 61.115(2) provides that members present at any annual or special meeting constitute a quorum unless the bylaws provide that a greater number constitutes a quorum. The proposal generally follows current law, except that the phrase "votes represented" includes proxies. The proposal also allows a greater number to be specified in the articles. The procedure for amending quorum requirements has no counterpart in ORS Chapter 61.

(3) *Relationship to the Oregon Business Corporation Act:* The proposal generally parallels ORS 60.241 and 60.247(2).

(4) *Other Comments:* An amendment to quorum requirements must be adopted by a vote meeting the quorum required immediately before the amendment. *See* ORS 60.247(2).

65.244 VOTING REQUIREMENTS

(1) Unless this chapter, the articles or the bylaws require a greater vote or voting by class, if a quorum is present, the affirmative vote of a majority of the votes represented and voting is the act of the members.

(2) An amendment to the articles or bylaws to add to, change or delete the vote required for any member action must be approved by the members. [1989 c.1010 § 63]

OFFICIAL COMMENT TO ORS 65.244 (MODEL ACT § 7.23)

(1) *Proposed Changes to the Model Act:* To parallel the changes in the definition of "approved by the members" in ORS 65.001(2) by comparison with Model Act § 1.40, subsection (1) is modified by deleting the additional requirement that a vote be the majority of the quorum. Since voting requirements can be in the articles, sub-

section (2) mentions amendments to the articles. To parallel ORS 60.247(2), subsection (2) mentions addition, change, or deletion of voting requirements.

(2) *Effective Changes from Chapter 61 Provisions:* Existing law treats abstentions as negative votes, whereas subsection (1) does not count abstentions. Subsection (2) has no analogue in Chapter 61.

(3) *Relationship to the Oregon Business Corporation Act:* Subsection (1) is analogous to ORS 60.241(3) and subsection (2) is analogous to ORS 60.241(4) and 60.247, except that voting requirements may be in the bylaws as well as in the articles. Chapter 60 introduced into Oregon the change in the treatment of abstentions proposed here for nonprofit corporations.

(4) *Other Comments:* An amendment to voting requirements must be adopted by the vote and classes required to take action immediately prior to the amendment. *See* ORS 60.247(2).

65.247 CUMULATIVE VOTING FOR DIRECTORS

(1) If the articles or bylaws provide for cumulative voting by members, members may so vote, by multiplying the number of votes the members are entitled to cast by the number of directors for whom they are entitled to vote, and cast the product for a single candidate or distribute the product among two or more candidates.

(2) Cumulative voting is not authorized at a particular meeting unless:

(a) The meeting notice or statement accompanying the notice states that cumulative voting will take place; or

(b) A member gives notice during the meeting and before the vote is taken of the member's intent to cumulate votes, and if one member gives this notice all other members participating in the election are entitled to cumulate their votes without giving further notice.

(3) A director elected by cumulative voting may be removed by the members without cause if the requirements of ORS 65.324 are met unless the votes cast against removal, or not consenting in writing to such removal, would be sufficient to elect such director if voted cumulatively at an election at which the same total number of votes were cast or, if such action is taken by written ballot, all memberships entitled to vote were voted and the entire number of

directors authorized at the time of the director's most recent election were then being elected.

(4) Members may not cumulatively vote if the directors and members are identical. [1989 c.1010 § 65]

OFFICIAL COMMENT TO ORS 65.247 (MODEL ACT § 7.25)

(1) *Proposed Changes to the Model Act:* The proposal follows the Model Act.

(2) *Effective Changes from Chapter 61 Provisions:* ORS 61.111(3) allows for cumulative voting if it is authorized in the articles, but does not provide nearly the detail specified in the Model Act.

(3) *Relationship to the Oregon Business Corporation Act:* The Model Act is more detailed than ORS 60.251, which does provide for cumulative voting.

65.251 OTHER METHODS OF ELECTING DIRECTORS

A corporation may provide in its articles or bylaws for election of directors by members or delegates:

- (1) On the basis of chapter or other organizational unit;
- (2) By region or other geographic unit;
- (3) By preferential voting; or
- (4) By any other reasonable method. [1989 c.1010 § 66]

OFFICIAL COMMENT TO ORS 65.251 (MODEL ACT § 7.26)

(1) *Proposed Changes to the Model Act:* None.

(2) *Effective Changes from Chapter 61 Provisions:* No counterpart provisions appear in ORS Chapter 61.

(3) *Relationship to the Oregon Business Corporation Act:* No parallel provision appears in ORS Chapter 60.

(4) *Other Comments:* The flexibility allowed by the proposal is desirable in view of the variety of organizations that may be governed by the Act.

(VOTING AGREEMENTS)

65.254 VOTING AGREEMENTS

(1) Two or more members may provide for the manner in which they will vote by signing an agreement for that purpose. Such agree-

ments may be valid for a period of up to 10 years. For public benefit corporations such agreements must have a reasonable purpose not inconsistent with the corporation's public or charitable purposes.

(2) A voting agreement created under this section is specifically enforceable. [1989 c.1010 § 69]

OFFICIAL COMMENT TO ORS 65.254 (MODEL ACT § 7.30)

(1) *Proposed Changes to the Model Act:* None

(2) *Effective Changes from Chapter 61 Provisions:* No counterpart provisions appear in ORS Chapter 61.

(3) *Relationship to the Oregon Business Corporation Act:* The provisions are similar to the voting agreement provisions in ORS 60.257(1) and (2). ORS 65.254, Model Act § 7.30, makes such agreements valid for up to 10 years, as is presently the case in ORS Chapter 60.

(4) *Other Comments:* The recognition of voting agreements may provide further assurance to members where otherwise enforceability of such agreements may have been doubtful.

DIRECTORS AND OFFICERS

(BOARD OF DIRECTORS)

65.301 REQUIREMENT FOR AND DUTIES OF BOARD

(1) Each corporation shall have a board of directors.

(2) All corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, the board of directors, subject to any limitation set forth in the articles of incorporation and except as provided in subsection (3) of this section.

(3) The articles of incorporation may authorize a person or persons, or the manner of designating a person or persons, authorized to exercise some or all of the powers which would otherwise be exercised by a board. To the extent so authorized any such person or persons shall have the duties and responsibilities of the directors, and the directors shall be relieved to that extent from such duties and responsibilities. [1989 c.1010 § 70]

OFFICIAL COMMENT TO ORS 65.301 (MODEL ACT § 8.01)

(1) *Proposed Changes to the Model Act:* The Model Act has

been modified to reflect the language of the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal broadens the corporation's power to delegate, in the articles, powers which would otherwise be exercised by the board. This power to delegate includes the power to retrieve delegated powers. For example, if the articles of incorporation authorize the board to delegate certain powers, the board of directors would also have the authority to retrieve such powers. The new provision specifies that directors are relieved from duties and responsibilities delegated by the articles.

(3) *Relationship to the Oregon Business Corporation Act*: Subsections (1) and (2) parallel ORS 60.301; subsection (3) has no corresponding provision in the Business Corporation Act.

65.304 QUALIFICATIONS OF DIRECTORS

All directors must be individuals. The articles of incorporation or bylaws may prescribe other qualifications for directors. [1989 c.1010 § 71]

OFFICIAL COMMENT TO ORS 65.304 (MODEL ACT § 8.02)

(1) *Proposed Changes to the Model Act*: None.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal specifies that directors must be individuals.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal generally parallels ORS 60.304, although ORS 60.304 spells out that directors need not be residents unless required by the articles or bylaws.

65.307 NUMBER OF DIRECTORS

(1) **A board of directors must consist of one or more individuals for a mutual benefit or religious corporation and three or more individuals for a public benefit corporation, with the number specified or fixed in accordance with the articles of incorporation or bylaws.**

(2) **The articles of incorporation or bylaws may establish a variable range for the size of the board of directors by fixing a minimum and maximum number of directors. If a variable range is established, the number of directors may be fixed or changed periodically, within the minimum and maximum, by the members or the**

board of directors. If the articles of incorporation establish a fixed or a variable range for the size of the board of directors and the corporation has members entitled to vote for directors, then only the members may change the range for the size of the board or change from a fixed or a variable-range size board. [1989 c.1010 § 72]

OFFICIAL COMMENT TO ORS 65.307 (MODEL ACT § 8.03)

(1) *Proposed Changes to the Model Act*: The proposal permits the board of a mutual benefit or religious corporation to consist of one or more persons (*See* ORS 61.125(1)), however, it requires three or more persons to serve on the board of a public benefit corporation. This change for public benefit corporations was requested by the Attorney General. Having a three-person board helps assure diversity of input into the governance of public benefit corporations and avoids, for example, a husband and wife alone controlling a public corporation's affairs. Wording changes have been made for consistency, and subsection (2) has been added to conform to the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal generally follows ORS 61.125, except for requiring three-person boards for public benefit corporations. Prior to 1985, Oregon's Nonprofit Corporation Law required three-person boards for all nonprofit corporations.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal parallels ORS 60.307(2), except for the three-person board requirement.

(4) *Other comments*. ORS 65.957(3) is a transition provision allowing public benefit corporations a year to comply with the requirement of a three-member board.

65.311 ELECTION, DESIGNATION AND APPOINTMENT OF DIRECTORS

(1) **If the corporation has members entitled to vote for directors, all the directors, except the initial directors, shall be elected at the first annual meeting of members, and at each annual meeting thereafter, unless the articles or bylaws provide some other time or method of election, or provide that some of the directors are appointed by some other person or are designated.**

(2) If the corporation does not have members entitled to vote for directors, all the directors, except the initial directors, shall be elected, appointed or designated as provided in the articles or bylaws. If no method of election, appointment or designation is set forth in the articles or bylaws, the directors, other than the initial directors, shall be elected by the board. [1989 c.1010 § 73]

OFFICIAL COMMENT TO ORS 65.311 (MODEL ACT § 8.04)

(1) *Proposed Changes to the Model Act*: None.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal distinguishes between corporations with and corporations without members entitled to vote for directors. If a corporation has members entitled to vote for directors, the members elect directors except to the extent the articles or bylaws provide for the appointment or designation of some directors. Otherwise, directors are elected, appointed or designated as provided in the articles or bylaws, or if no such provision is made, directors are elected by the board. ORS 65.222, Model Act § 7.08, preserves the possibility of conducting elections by mail.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal diverges from ORS 60.307(3) and 60.311 because of the inherent differences between corporations with shareholders and nonprofit corporations.

65.314 TERMS OF DIRECTORS GENERALLY

(1) The articles or bylaws may specify the terms of directors. Except for designated or appointed directors, the terms of directors may not exceed five years. In the absence of any term specified in the articles or bylaws, the term of each director shall be one year. Directors may be elected for successive terms.

(2) A decrease in the number of directors or term of office does not shorten an incumbent director's term.

(3) Except as provided in the articles or bylaws:

(a) The term of a director filling a vacancy in the office of an elected director expires at the next election of directors; and

(b) The term of a director filling any other vacancy expires at the end of the unexpired term which such director is filling.

(4) Despite the expiration of a director's term, the director continues to serve until the director's successor is elected, designated

or appointed and qualifies, or until there is a decrease in the number of directors. [1989 c.1010 § 74]

OFFICIAL COMMENT TO ORS 65.314 (MODEL ACT § 8.05)

(1) *Proposed Changes to the Model Act*: None.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal sets a five year upper limit on the terms of directors, except for appointed or designated directors. The proposal also provides that the term of a director filling a vacancy in the office of a director elected by the members expires at the next election of directors rather than at the end of the unexpired term.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal generally parallels ORS 60.314, although ORS 60.314 contemplates that terms will be for one year unless the articles or bylaws provide for staggered terms.

65.317 STAGGERED TERMS FOR DIRECTORS

The articles or bylaws may provide for staggering the terms of directors by dividing the total number of directors into groups. The terms of office of the several groups need not be uniform. [1989 c.1010 § 75]

OFFICIAL COMMENT TO ORS 65.317 (MODEL ACT § 8.06)

(1) *Proposed Changes to the Model Act*: None.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal is substantively similar to ORS 61.125(3).

(3) *Relationship to the Oregon Business Corporation Act*: ORS 60.317 provides for staggered terms in much more detail than the proposal.

65.321 RESIGNATION OF DIRECTORS

(1) A director may resign at any time by delivering written notice to the board of directors, its presiding officer or to the president or secretary.

(2) A resignation is effective when the notice is effective under ORS 65.034 unless the notice specifies a later effective date.

(3) Once delivered, a notice of resignation is irrevocable unless revocation is permitted by the board of directors. [1989 c.1010 § 76]

OFFICIAL COMMENT TO ORS 65.321 (MODEL ACT § 8.07)

(1) *Proposed Changes to the Model Act:* The Model Act has been changed to be consistent with the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions:* ORS Chapter 61 contains no resignation provisions. The addition of resignation provisions should add greater certainty to corporate actions.

(3) *Relationship to the Oregon Business Corporation Act:* The proposal tracks ORS 60.321.

65.324 REMOVAL OF DIRECTORS ELECTED BY MEMBERS OR DIRECTORS

(1) The members may remove one or more directors elected by them with or without cause unless the articles of incorporation provide that directors may be removed only for cause.

(2) If a director is elected by a class, chapter or other organizational unit or by region or other geographic grouping, only the members of that class, chapter, unit or grouping entitled to vote may participate in the vote to remove the director.

(3) Except as provided in subsection (9) of this section, a director may be removed under subsection (1) or (2) of this section only if the number of votes cast to remove the director would be sufficient to elect the director at a meeting to elect directors.

(4) If cumulative voting is authorized, a director may not be removed if the number of votes, or if the director was elected by a class, chapter, unit or grouping of members, the number of votes of that class, chapter, unit or grouping, sufficient to elect the director under cumulative voting is voted against the director's removal.

(5) An elected director may be removed by the members only at a meeting called for the purpose of removing the director and the meeting notice must state that the purpose, or one of the purposes, of the meeting is removal of the director.

(6) In computing whether a director is protected from removal under subsections (2) to (4) of this section, it should be assumed that the votes against removal are cast in an election for the number of directors of the class to which the director to be removed belonged on the date of that director's election.

(7) An entire board of directors may be removed under subsections (1) to (5) of this section.

(8) A director elected by the board of directors may be removed

with or without cause, unless the articles of incorporation or bylaws provide that directors may be removed only for cause, by the vote of two-thirds of the directors then in office or such greater number as is set forth in the articles or bylaws. However, a director elected by the board to fill the vacancy of a director elected by the members may be removed by the members, but not the board.

(9) If at the beginning of a director's term on the board, the articles or bylaws provide that the director may be removed for reasons set forth in the articles or bylaws, the board may remove the director for such reasons. The director may be removed only if a majority of the directors then in office vote for the removal.

(10) The articles or bylaws of a religious corporation may:

(a) Limit the application of this section; and

(b) Set forth the vote and procedures by which the board or any person may remove with or without cause a director elected by the members or the board. [1989 c.1010 § 77]

OFFICIAL COMMENT TO ORS 65.324 (MODEL ACT § 8.08)

(1) *Proposed Changes to the Model Act:* Subsection (1) has been modified to permit the articles of incorporation to limit removal by the members to removal for cause. Wording changes have been made in subsection (2) to create consistency with ORS 60.324(2). Subsection (9) has been expanded so that the board may remove a director for any reasons set forth in the bylaws, not just for missing board meetings. For example, other specified reasons might include missing committee meetings or failing to complete assigned duties.

(2) *Effective Changes from Chapter 61 Provisions:* The proposal is more detailed than ORS 61.127, and adds provisions for the removal of directors elected by the board of directors. The proposal also places lesser limitations on religious corporations by providing that the articles or bylaws of a religious corporation may establish removal procedures or limit the application of the section.

(3) *Relationship to the Oregon Business Corporation Act:* The proposal generally tracks ORS 60.324 but is more detailed. ORS 60.324 states that the articles may provide that directors may be removed only for cause.

65.327 REMOVAL OF DIRECTORS BY JUDICIAL PROCEEDING

(1) The circuit court of the county where a corporation's princi-

pal office is located, or if the principal office is not in this state where its registered office was last located, may remove any director of the corporation from office in a proceeding commenced either by the corporation, at least 10 percent of the members of any class entitled to vote for directors, or the Attorney General in the case of a public benefit corporation if the court finds that:

(a) The director engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation, or the director has violated a duty set forth in ORS 65.357 to 65.367; and

(b) Removal is in the best interest of the corporation.

(2) The court that removes a director may bar the director from serving on the board for a period prescribed by the court.

(3) If members or the Attorney General commence a proceeding under subsection (1) of this section, the corporation shall be made a party defendant.

(4) A public benefit corporation or its members who commence a proceeding under subsection (1) of this section shall give the Attorney General written notice of the proceeding.

(5) The articles or bylaws of a religious corporation may limit or prohibit the application of this section. [1989 c.1010 § 79]

OFFICIAL COMMENT TO ORS 65.327 (MODEL ACT § 8.10)

(1) *Proposed Changes to the Model Act:* Minor wording changes have been made for consistency with the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions:* ORS Chapter 61 contains no provisions relating to judicial removal of directors. The proposal gives members who would not have sufficient votes under ORS 65.324 (Model Act § 8.08) additional rights to remove directors for specified causes. The proposal also enables the Attorney General to participate in judicial removal of public benefit corporation directors. On the other hand, the proposal provides more flexibility for religious corporations by permitting their articles or bylaws to limit or prohibit application of this section.

(3) *Relationship to the Oregon Business Corporation Act:* The proposal generally follows ORS 60.327, but includes additional provisions applicable to particular forms of nonprofit corporations and

the Attorney General and adds violation of the statutory duties of directors as a ground for removal.

65.331 REMOVAL OF DESIGNATED OR APPOINTED DIRECTORS

(1) A designated director may be removed by an amendment to the articles or bylaws deleting or changing the designation.

(2) If a director is appointed:

(a) Except as otherwise provided in the articles or bylaws, the director may be removed with or without cause by the person appointing the director;

(b) The person removing the director shall do so by giving written notice of the removal to the director and either the presiding officer of the board or the corporation's president or secretary; and

(c) A removal is effective when the notice is effective under ORS 65.034 unless the notice specifies a future effective date. [1989 c.1010 § 78]

OFFICIAL COMMENT TO ORS 65.331 (MODEL ACT § 8.09)

(1) *Proposed Changes to the Model Act:* The Model Act has been changed for consistency with the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions:* ORS Chapter 61 contains no provisions relating to removal of appointed or designated directors. The proposal adds clarity in the treatment of such directors.

(3) *Relationship to the Oregon Business Corporation Act:* ORS Chapter 60 contains no similar provisions.

65.334 VACANCY ON BOARD

(1) Unless the articles or bylaws provide otherwise, and except as provided in subsections (2) and (3) of this section, if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors:

(a) The members entitled to vote for directors, if any, may fill the vacancy. If the vacant office was held by a director elected by a class, chapter or other organizational unit or by region or other geographic grouping, only members of the class, chapter, unit or grouping are entitled to vote to fill the vacancy if it is filled by the members;

(b) The board of directors may fill the vacancy; or

(c) If the directors remaining in office constitute fewer than a quorum of the board of directors, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.

(2) Unless the articles or bylaws provide otherwise, if a vacant office was held by an appointed director, only the person who appointed the director may fill the vacancy.

(3) If a vacant office was held by a designated director, the vacancy shall be filled as provided in the articles or bylaws. In the absence of an applicable article or bylaw provision, the vacancy may not be filled by the board.

(4) A vacancy that will occur at a specific later date, by reason of a resignation effective at a later date under ORS 65.321 (2) or otherwise, may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs. [1989 c.1010 § 80]

OFFICIAL COMMENT TO ORS 65.334 (MODEL ACT § 8.11)

(1) *Proposed Changes to the Model Act:* Minor wording changes have been made for consistency.

(2) *Effective Changes from Chapter 61 Provisions:* The proposal is more detailed than ORS 61.131 and provides a specific mechanism for replacing appointed and designated directors.

(3) *Relationship to the Oregon Business Corporation Act:* The proposal generally tracks ORS 60.331, with differences to reflect the distinctions between members and shareholders, and the absence of designated and appointed directors and private corporations.

65.335 COMPENSATION OF DIRECTORS

Unless the articles or bylaws provide otherwise, the board of directors may fix the compensation of directors. [1989 c.1010 § 81]

OFFICIAL COMMENT TO ORS 65.335 (MODEL ACT § 8.12)

(1) *Proposed Changes to the Model Act:* None.

(2) *Effective Changes from Chapter 61 Provisions:* Part of ORS 61.165 corresponds to the proposal.

(3) *Relationship to the Oregon Business Corporation Act:* The proposal parallels ORS 60.334.

Note - The proposal omits Model Act § 8.13 (financially disinterested majority—public benefit corporation).

(MEETINGS AND ACTION OF BOARD)

65.337 REGULAR AND SPECIAL MEETINGS

(1) If the time and place of a director's meeting is fixed by the bylaws or is regularly scheduled by the board of directors, the meeting is a regular meeting. All other meetings are special meetings.

(2) The board of directors may hold regular or special meetings in or out of this state.

(3) Unless the articles or bylaws provide otherwise, the board of directors may permit any or all directors to participate in a regular or special meeting by, or conduct the meeting through, use of any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting. [1989 c.1010 § 82]

OFFICIAL COMMENT TO ORS 65.337 (MODEL ACT § 8.20)

(1) *Proposed Changes to the Model Act:* Wording changes have been made for consistency with the Business Corporation Act and to clarify that while regular meetings include regularly scheduled meetings of the board, they do not include all meetings of the board of directors.

(2) *Effective Changes from Chapter 61 Provisions:* The proposal spells out what constitutes regular and special meetings of the board of directors. Otherwise, the proposal closely tracks the first portion of ORS 61.145(1) and 61.145(2).

(3) *Relationship to the Oregon Business Corporation Act:* The proposal generally tracks ORS 60.337.

65.341 ACTION WITHOUT MEETING

(1) Unless the articles or bylaws provide otherwise, action required or permitted by this chapter to be taken at the board of directors' meeting may be taken without a meeting if the action is taken by all members of the board of directors. The action shall be evidenced by one or more written consents describing the action

taken, signed by each director, and included in the minutes or filed with the corporate records reflecting the action taken.

(2) Action taken under this section is effective when the last director signs the consent, unless the consent specifies an earlier or later effective date.

(3) A consent signed under this section has the effect of a meeting vote and may be described as such in any document. [1989 c.1010 § 83]

OFFICIAL COMMENT TO ORS 65.341 (MODEL ACT § 8.21)

(1) *Proposed Changes to the Model Act*: Minor wording changes have been made for consistency.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal is more detailed than ORS 61.935, most specifically with respect to the effective date of actions taken without a meeting.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal parallels ORS 60.341.

65.344 CALL AND NOTICE OF MEETINGS

(1) Unless the articles, bylaws or this chapter provide otherwise, regular meetings of the board may be held without notice of the date, time, place or purpose of the meeting.

(2) Unless the articles of incorporation or bylaws provide for a longer or shorter period, special meetings of the board must be preceded by at least two days' notice to each director of the date, time and place of the meeting. Unless this chapter provides otherwise, the notice need not describe the purposes of the special meeting unless required by the articles of incorporation or bylaws.

(3) Unless the articles or bylaws provide otherwise, the presiding officer of the board, the president or 20 percent of the directors then in office may call and give notice of a meeting of the board. [1989 c.1010 § 84]

OFFICIAL COMMENT TO ORS 65.344 (MODEL ACT § 8.22)

(1) *Proposed Changes to the Model Act*: Wording changes have been made in subsections (1) and (2) to parallel ORS 60.344. Model Act subsection (c) has been omitted.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal differentiates between notice required for regular and special meet-

ings. Unless the articles or bylaws provide otherwise, regular meetings may be held without notice and special meetings may be held on two days notice. Requirements relating to the contents of such notice are contained in other sections. For example, ORS 65.534(5), Model Act § 12.02(e), contains notice requirements for sales of assets other than in the regular course of business.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal tracks ORS 60.344, but adds a call of meeting provision.

65.347 WAIVER OF NOTICE

(1) A director may at any time waive any notice required by this chapter, the articles of incorporation or bylaws. Except as provided in subsection (2) of this section, the waiver must be in writing, must be signed by the director entitled to the notice, must specify the meeting for which notice is waived and must be filed with the minutes or the corporate records.

(2) A director's attendance at or participation in a meeting waives any required notice to the director of the meeting unless the director, at the beginning of the meeting, or promptly upon the director's arrival, objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to any action taken at the meeting. [1989 c.1010 § 85]

OFFICIAL COMMENT TO ORS 65.347 (MODEL ACT § 8.23)

(1) *Proposed Changes to the Model Act*: The Model Act has been changed to correspond to the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions*: Subsection (1) restates the waiver provisions in ORS 61.930. Subsection (2) expands the provisions on the effect of attendance of a director at a meeting currently in ORS 61.145(1).

(3) *Relationship to the Oregon Business Corporation Act*: The proposal parallels ORS 60.347.

65.351 QUORUM AND VOTING

(1) Unless the articles of incorporation or bylaws require a greater number or a lesser number as authorized under subsection (2) of this section, a quorum of a board of directors consists of:

(a) If the corporation has a fixed board size, a majority of the fixed number of directors; or

(b) If the corporation has a variable-range size board, a majority of the number of directors prescribed, or if no number is prescribed, a majority of the number in office immediately before the meeting begins.

(2) The articles of incorporation or bylaws may authorize a quorum of a board of directors to consist of no fewer than one-third of the fixed or prescribed number of directors determined under subsection (1) of this section.

(3) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present when the act is taken is the act of the board of directors unless the articles of incorporation or bylaws require the vote of a greater number of directors. A director is considered present regardless of whether the director votes or abstains from voting.

(4) A director who is present at a meeting of the board of directors or a committee of the board of directors when corporate action is taken is deemed to have assented to the action taken unless:

(a) The director objects at the beginning of the meeting, or promptly upon the director's arrival, to holding the meeting or transacting the business at the meeting;

(b) The director's dissent or abstention from the action taken is entered in the minutes of the meeting; or

(c) The director delivers written notice of dissent or abstention to the presiding officer of the meeting before its adjournment or to the corporation immediately after adjournment of the meeting. The right of dissent or abstention is not available to a director who votes in favor of the action taken. [1989 c.1010 § 86; 1991 c.231 § 4]

OFFICIAL COMMENT TO ORS 65.351 (MODEL ACT § 8.24)

(1) *Proposed Changes to the Model Act*: Changes have been made for consistency with the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal is substantively similar to ORS 61.135.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal generally parallels ORS 60.351 but is less detailed. However, ORS 60.351 contains several provisions relating to when a director is not deemed to have assented to the action of the board of directors.

OFFICIAL COMMENT TO 1991 LEGISLATIVE AMENDMENT

The amendment is intended to make it clear that a director who abstains from voting will be considered present.

65.354 COMMITTEES

(1) Unless the articles or bylaws provide otherwise, a board of directors may create one or more committees of the board of directors which exercise the authority of the board of directors and appoint members of the board to serve on them or designate the method of selecting committee members. Each committee shall consist of two or more directors, who serve at the pleasure of the board of directors.

(2) The creation of a committee and appointment of directors to the committee or designation of a method of selecting committee members must be approved by the greater of:

(a) A majority of all the directors in office when the action is taken; or

(b) The number of directors required by the articles or bylaws to take action under ORS 65.351.

(3) ORS 65.337 to 65.351, governing meetings, action without meetings, notice and waiver of notice, and quorum and voting requirements of the board of directors, apply to committees and their members as well.

(4) Except as provided in subsection (5) of this section, to the extent specified by the board of directors or in the articles or bylaws, each committee of the board may exercise the authority of the board of directors.

(5) A committee of the board may not:

(a) Authorize distributions;

(b) Approve or recommend to members dissolution, merger or the sale, pledge or transfer of all or substantially all of the corporation's assets;

(c) Elect, appoint or remove directors or fill vacancies on the board or on any of its committees; or

(d) Adopt, amend or repeal the articles or bylaws.

(6) The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with

the standards of conduct described in ORS 65.357. [1989 c.1010 § 87]

OFFICIAL COMMENT TO ORS 65.354 (MODEL ACT § 8.25)

(1) *Proposed Changes to the Model Act:* The Model Act has been changed to make the language track the Business Corporation Act and to provide that the board of directors may designate a method for selecting members of committees.

(2) *Effective Changes from Chapter 61 Provisions:* The proposal generally follows ORS 61.141, but it is more explicit about the mechanics of creating and operating committees.

(3) *Relationship to the Oregon Business Corporation Act:* The proposal parallels ORS 60.354, although the two diverge in order to address shareholder and member related issues.

(STANDARDS OF CONDUCT)

65.357 GENERAL STANDARDS FOR DIRECTORS

(1) A director shall discharge the duties of a director, including the director's duties as a member of a committee:

(a) In good faith;

(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(c) In a manner the director reasonably believes to be in the best interests of the corporation.

(2) In discharging the duties of a director, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by:

(a) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

(b) Legal counsel, public accountants or other persons as to matters the director reasonably believes are within the person's professional or expert competence;

(c) A committee of the board of which the director is not a member, as to matters within its jurisdiction, if the director reasonably believes the committee merits confidence; or

(d) In the case of religious corporations, religious authorities and

ministers, priests, rabbis or other persons whose position or duties in the religious organization the director believes justify reliance and confidence and whom the director believes to be reliable and competent in the matters presented.

(3) A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) of this section unwarranted.

(4) A director is not liable to the corporation, any member or any other person for any action taken or not taken as a director, if the director acted in compliance with this section. The liability of a director for monetary damages to the corporation and its members may be eliminated or limited in the corporation's articles to the extent provided in ORS 65.047 (2)(c).

(5) A director shall not be deemed to be a trustee with respect to the corporation or with respect to any property held or administered by the corporation, including without limit, property that may be subject to restrictions imposed by the donor or transferor of such property. [1989 c.1010 § 88]

OFFICIAL COMMENT TO ORS 65.357 (MODEL ACT § 8.30)

(1) *Proposed Changes to the Model Act:* The alternate form of Model Act § 8.30 has been chosen. This form adds a sentence to subsection (4) permitting the corporation to limit the liability of directors in its articles to the extent provided in ORS 65.047(2)(c), Model Act § 2.02(b)(5).

(2) *Effective Changes from Chapter 61 Provisions:* The proposal is much broader than current ORS chapter 61. ORS 61.205 establishes a standard for entitlement and indemnity ("in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation"), but not a standard of care. ORS 61.218 does not establish a standard of care, but only limits the liability of statutorily defined "qualified directors" to acts of gross negligence or intentional acts.

(3) *Relationship to the Oregon Business Corporation Act:* The proposal parallels ORS 60.357 with two exceptions. ORS 60.357 does not contain language permitting the corporation to limit the directors' liability in the articles; however, corresponding language is included in ORS 60.047(2)(c). Second, the proposal adds lan-

guage stating that directors are not deemed to be trustees with respect to property held by the corporation.

65.361 DIRECTOR CONFLICT OF INTEREST

(1) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable or the basis for imposing liability on the director if the transaction is fair to the corporation at the time it was entered into or is approved as provided in subsection (2) or (3) of this section.

(2) A transaction in which a director of a public benefit or religious corporation has a conflict of interest may be approved:

(a) By the vote of the board of directors or a committee of the board of directors if the material facts of the transaction and the director's interest are disclosed or known to the board of directors or committee of the board of directors; or

(b) By obtaining approval of the:

(A) Attorney General; or

(B) The circuit court in an action in which the Attorney General is joined as party.

(3) A transaction in which a director of a mutual benefit corporation has a conflict of interest may be approved:

(a) In advance by the vote of the board of directors or a committee of the board of directors if the material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors; or

(b) If the material facts of the transactions and the director's interest were disclosed or known to the members and they authorized, approved or ratified the transaction.

(4) For the purposes of this section, a director of the corporation has an indirect interest in a transaction if:

(a) Another entity in which the director has a material interest or in which the director is a general partner is a party to the transaction; or

(b) Another entity of which the director is a director, officer or trustee is a party to the transaction, and the transaction is or should be considered by the board of directors of the corporation.

(5) For purposes of subsections (2) and (3) of this section, a conflict of interest transaction is authorized, approved or ratified if it

receives the affirmative vote of a majority of the directors on the board of directors or on the committee who have no direct or indirect interest in the transaction. A transaction may not be authorized, approved or ratified under this section by a single director. If a majority of the directors who have no direct or indirect interest in the transaction votes to authorize, approve or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any action taken under paragraph (a) of subsection (2) or paragraph (a) of subsection (3) of this section if the transaction is otherwise approved as provided in subsection (2) or (3) of this section.

(6) For purposes of paragraph (b) of subsection (3) of this section, a conflict of interest transaction is authorized, approved or ratified by the members if it receives a majority of the votes entitled to be counted under this subsection. Votes cast by or voted under the control of a director who has a direct or indirect interest in the transaction, and votes cast by or voted under the control of an entity described in subsection (4) of this section may be counted in a vote of members to determine whether to authorize, approve or ratify a conflict of interest transaction under paragraph (b) of subsection (3) of this section. A majority of the members, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

(7) The articles, bylaws or a resolution of the board may impose additional requirements on conflict of interest transactions. [1989 c.1010 § 89]

OFFICIAL COMMENT TO ORS 65.361 (MODEL ACT § 8.31)

(1) *Proposed Changes to the Model Act*: The text of the Model Act has been changed to delete the specific reference to the good faith belief and fairness requirement in subsection (b)(1)(ii), since such a duty is generally covered by ORS 65.357, Model Act § 8.30. Other wording changes have been made for internal consistency and consistency with the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions*: ORS Chapter 61 contains no conflict of interest provisions.

(3) *Relationship to the Oregon Business Corporation Act*: This

provision corresponds to ORS 60.361, but differs substantively because it distinguishes between the different categories of nonprofit corporations.

65.364 LOANS TO OR GUARANTEES FOR DIRECTORS AND OFFICERS

(1) **Public benefit and religious corporations may not make a loan, guarantee an obligation or modify a preexisting loan or guarantee to or for the benefit of a director or officer of the corporation, except as stated in this section. Unless prohibited by its articles or bylaws, a public benefit or religious corporation may make a loan, guarantee an obligation or modify a preexisting loan or guarantee to or for the benefit of a director or officer as part of a recruitment package, for a total period not to exceed three years, provided that:**

(a) **Approval of the loan, guarantee or modification is obtained in the manner provided in ORS 65.361 (2) and (5) for approval of issues involving director conflicts of interest;**

(b) **Notice of the loan, guarantee or modification is given to the members of the corporation in the manner provided in ORS 65.784 for notice of certain acts of indemnification; and**

(c) **Twenty or more days before the loan, guarantee or modification is to become binding on the corporation, written notice has been given to the Attorney General of the proposed recruitment package for the director or officer, including identification of the amount and character of all items of compensation and a separate statement of the amount and terms of any such loan, guarantee or modification.**

(2) **A mutual benefit corporation may not lend money to or guarantee the obligation of a director of the corporation unless:**

(a) **The particular loan or guarantee is approved by a majority of the votes of members entitled to vote, excluding the votes of members under the control of the benefited director; or**

(b) **The corporation's board of directors determines that the loan or guarantee benefits the corporation and either approves the specific loan or guarantee or a general plan authorizing the loans and guarantees.**

(3) **The fact that a loan or guarantee is made in violation of this section does not affect the borrower's liability on the loan. [1989 c.1010 § 90; 1991 c.231 § 6]**

OFFICIAL COMMENT TO ORS 65.364 (MODEL ACT § 8.32)

(1) *Proposed Changes to the Model Act:* The Model Act has been changed to distinguish between public benefit and religious corporations on the one hand and mutual benefit corporations on the other hand; mutual benefit corporations are governed by standards equivalent to those in the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions:* For public benefit and religious corporations, the proposal is substantively similar to the first sentence of ORS 61.170, but extends to guarantees as well as loans. For mutual benefit corporations, the proposal gives a procedure for approving loans or guarantees; subsection (3) adds that a loan or guarantee violating this section is nonetheless enforceable.

(3) *Relationship to the Oregon Business Corporation Act:* With respect to public benefit corporations and religious corporations, the proposal is more restrictive than ORS 60.364, which permits loans to directors if certain criteria are met.

OFFICIAL COMMENT TO 1991 LEGISLATIVE AMENDMENT

The amendment would allow loans and guarantees to or for the benefit of directors and officers of public benefit and religious corporations in connection with recruitment packages, provided that approval by special procedures required in conflict of interest transactions is obtained, and the modification is binding on the corporation only after 20 days have elapsed following notice to the Attorney General.

65.367 LIABILITY FOR UNLAWFUL DISTRIBUTIONS

(1) **Unless a director complies with the applicable standards of conduct described in ORS 65.357, a director who votes for or assents to a distribution made in violation of this chapter or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating this chapter.**

(2) **A director held liable for an unlawful distribution under subsection (1) of this section is entitled to contribution:**

(a) **From every other director who voted for or assented to the distribution without complying with the applicable standards of conduct described in ORS 65.357; and**

(b) From each person who received an unlawful distribution for the amount of the distribution whether or not the person receiving the distribution knew it was made in violation of this chapter or the articles of incorporation. [1989 c.1010 § 91]

OFFICIAL COMMENT TO ORS 65.367 (MODEL ACT § 8.33)

(1) *Proposed Changes to the Model Act:* Minor language changes have been made to track the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions:* The proposal broadens ORS 61.170, pertaining to directors' liability for unlawful loans, into a general provision covering directors' liability for unlawful distributions.

(3) *Relationship to the Oregon Business Corporation Act:* The proposal parallels ORS 60.367. However, the term "distribution" is defined very differently in the two acts.

65.369 LIABILITY OF QUALIFIED DIRECTORS

(1) The civil liability of a qualified director for the performance or nonperformance of the director's duties shall be limited to gross negligence or intentional misconduct.

(2) This section does not affect the civil liability of the entity which a qualified director serves.

(3) For the purposes of this section, "qualified director" means a person who serves without compensation for personal services as:

(a) A member of a board or commission of the state or a governmental subdivision for the purpose of setting policy and controlling or otherwise overseeing the activities or functional responsibilities of the board or commission but, notwithstanding ORS 30.265 (2), the entity is not thereby rendered immune from liability;

(b) An officer, director or member of an executive board for the purpose of setting policy and controlling or otherwise overseeing the activities or functional responsibilities of a nonprofit corporation, unincorporated association or nonprofit cooperative corporation that has as its primary purpose:

(A) Religion;

(B) Charity;

(C) Benevolence;

(D) Providing goods or services at no charge to the general public;

(E) Education;

(F) Scientific activity;

(G) Medical or hospital services at reduced costs; or

(H) Engaging in activities of the nature specified in section 501 of the Internal Revenue Code of 1986, as amended;

(c) A director for the purpose of setting policy and controlling or otherwise overseeing the activities or functional responsibilities of an organization which acts as an advocate for its members and which has as its members individuals or organizations that are:

(A) Members of a particular trade or industry; or

(B) Members of the business community of a particular municipality or area of the state; or

(d) An officer, director or member of an executive board for the purpose of setting policy and controlling or otherwise overseeing the activities or functional responsibilities of a nonprofit corporation, unincorporated association or nonprofit cooperative corporation composed of owners or lessees of units or interests in any condominium submitted to the provisions of ORS 100.005 to 100.625, any planned community as defined in ORS 94.550 (9), any timeshare property as defined in ORS 94.803 (26), any residential cooperative community or any other residential or commercial common interest real estate community.

(4) An otherwise qualified director shall not be considered to be compensated for personal services if the director receives payment only for actual expenses incurred in attending meetings or performing a director's duties or receives a stipend which is paid only to compensate the director for average expenses incurred over the course of a year. [1989 c.1010 §§ 92, 92a; 1991 c.64 § 4; 1991 c.81 § 1; 1991 c.231 § 5]

OFFICIAL COMMENT TO ORS 65.369 (MODEL ACT § (NONE))

(1) *Proposed Changes to the Model Act:* No such provision appears in the Model Act.

(2) *Effective Changes from Chapter 61 Provisions:* Subsection (d) added. This section carries forward ORS 61.218 that was added in 1987. The phrase "governmental subdivision" is used for terminological consistency.

(3) *Relationship to the Oregon Business Corporation Act:* No counterpart exists in Chapter 60.

(4) *Other Comments*: This section provides minimal exoneration for volunteer directors and officers. Subsection (4) is similar to the definition of “uncompensated officer” in ORS 65.001(36), Model Act § 1.40.

(OFFICERS)

65.371 REQUIRED OFFICERS

(1) A corporation shall have a president, a secretary and such other officers as are elected or appointed by the board or by any other person as may be authorized in the articles or bylaws, provided that the articles of incorporation or bylaws may designate other titles in lieu of president and secretary.

(2) The bylaws or the board shall delegate to one of the officers responsibility for preparing minutes of the directors’ and members’ meetings and for authenticating records of the corporation.

(3) The same individual may simultaneously hold more than one office in a corporation. [1989 c.1010 § 93; 1991 c.231 § 7]

OFFICIAL COMMENT TO ORS 65.371 (MODEL ACT § 8.40)

(1) *Proposed Changes to the Model Act*: Language has been added to clarify that corporations may use nontraditional names for designation of officers. This is clear in the existing law. The comments to the Model Act indicate that the Model Act is intended to have the same result.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal is similar to ORS 61.151, but contains no language relating to the terms of officers. It does provide that the bylaws or board shall delegate to an officer responsibility for preparing minutes and authenticating records.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal generally parallels ORS 60.371, although the Business Corporation Act requires the secretary to prepare minutes and authenticate records. The proposal also allows use of other titles in lieu of president and secretary since many nonprofits use nontraditional titles.

OFFICIAL COMMENT TO 1991 LEGISLATIVE AMENDMENT

The amendment clarifies that officers may be elected as well as

appointed by the board, and that the articles or bylaws may authorize others to elect or appoint officers as well.

65.374 DUTIES AND AUTHORITY OF OFFICERS

Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties and authority prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the duties of other officers. [1989 c.1010 § 94]

OFFICIAL COMMENT TO ORS 65.374 (MODEL ACT § 8.41)

(1) *Proposed Changes to the Model Act*: Minor language changes have been made to parallel the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions*: ORS Chapter 61 has no description of the duties of officers.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal parallels ORS 60.374.

65.377 STANDARDS OF CONDUCT FOR OFFICERS

(1) An officer shall discharge the officer’s duties:

(a) In good faith;

(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(c) In a manner the officer reasonably believes to be in the best interests of the corporation.

(2) In discharging the duties of an officer, an officer is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by:

(a) One or more officers or employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented;

(b) Legal counsel, public accountants or other persons as to matters the officer reasonably believes are within the person’s professional or expert competence; or

(c) In the case of religious corporations, religious authorities and ministers, priests, rabbis or other persons whose position or duties in the religious organization the officer believes justify reliance and

confidence and whom the officer believes to be reliable and competent in the matters presented.

(3) An officer is not acting in good faith if the officer has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) of this section unwarranted.

(4) An officer is not liable to the corporation, any member or other person for any action taken or not taken as an officer if the officer acted in compliance with this section. The liability of the officer for monetary damages to the corporation and its members may be eliminated or limited in the corporation's articles to the extent provided in ORS 65.047 (2)(c). [1989 c.1010 § 95]

OFFICIAL COMMENT TO ORS 65.377 (MODEL ACT § 8.42)

(1) *Proposed Changes to the Model Act*: Subsection (1) has been changed to cover officers' duties generally, rather than only discretionary duties. Subsection (4) has been expanded to permit corporations to limit officers' liability in the articles of incorporation to the same extent the articles may limit directors' liability.

(2) *Effective Changes from Chapter 61 Provisions*: ORS Chapter 61 has no provisions setting a standard of conduct for officers. The proposal parallels the standard of conduct of directors.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal generally parallels ORS 60.377.

65.381 RESIGNATION AND REMOVAL OF OFFICERS

(1) An officer may resign at any time by delivering notice to the corporation. A resignation is effective when the notice is effective under ORS 65.034 unless the notice specifies a later effective date. If a resignation is made effective at a later date and the corporation accepts the later effective date, its board of directors or any other person as authorized under the articles or bylaws may fill the pending vacancy before the effective date if the board or any other person provides that the successor does not take office until the effective date.

(2) A board of directors or any other person authorized under the articles or bylaws to elect or appoint an officer may remove any officer the board or any other person is entitled to elect or appoint, at any time with or without cause.

(3) Once delivered, a notice of resignation is irrevocable unless

revocation is permitted by the board of directors. [1989 c.1010 § 96; 1991 c.231 § 8]

OFFICIAL COMMENT TO ORS 65.381 (MODEL ACT § 8.43)

(1) *Proposed Changes to the Model Act*: The Model Act has been changed to parallel the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal broadens ORS 61.155 to cover resignation as well as removal.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal parallels ORS 60.381.

OFFICIAL COMMENT TO 1991 LEGISLATIVE AMENDMENT

The amendments are intended to conform to the change proposed for ORS 65.227(1).

65.384 CONTRACT RIGHTS OF OFFICERS

(1) **The appointment of an officer does not itself create contract rights.**

(2) **Removal or resignation of an officer does not affect the contract rights, if any, of the corporation or the officer.** [1989 c.1010 § 97]

OFFICIAL COMMENT TO ORS 65.384 (MODEL ACT § 8.44)

(1) *Proposed Changes to the Model Act*: Language changes have been made to make the Model Act consistent with the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal expands upon the last sentence of ORS 61.155 to make it clear that the appointment of an officer does not itself create contractual rights and that removal or resignation do not affect either party's contractual rights.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal parallels ORS 60.384.

Note - The proposal omits Model Act § 8.45 (officers' authority to execute documents).

(INDEMNIFICATION)

65.387 DEFINITIONS FOR ORS 65.387 TO 65.414

As used in ORS 65.387 to 65.414:

(1) "Corporation" includes any domestic or foreign predecessor entity of a corporation in a merger or other transaction in which the predecessor's existence ceased upon consummation of the transaction.

(2) "Director" means an individual who is or was a director of a corporation or an individual who, while a director of a corporation, is or was serving at the corporation's request as a director, officer, partner, trustee, employee, or agent of another foreign or domestic business or nonprofit corporation, partnership, joint venture, trust, employee benefit plan or other enterprise. A director is considered to be serving an employee benefit plan at the corporation's request if the director's duties to the corporation also impose duties on, or otherwise involve services by, the director to the plan or to participants in or beneficiaries of the plan. "Director" includes, unless the context requires otherwise, the estate or personal representative of a director.

(3) "Expenses" include attorney fees.

(4) "Liability" means the obligation to pay a judgment, settlement, penalty, fine, including an excise tax assessed with respect to an employee benefit plan, or reasonable expenses actually incurred with respect to a proceeding.

(5) "Officer" means an individual who is or was an officer of a corporation or an individual who, while an officer of a corporation, is or was serving at the corporation's request as a director, officer, partner, trustee, employee or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan or other enterprise. An officer is considered to be serving an employee benefit plan at the corporation's request if the officer's duties to the corporation also impose duties on or include services by the officer to the employee benefit plan or to participants in or beneficiaries of the plan. "Officer" includes, unless the context requires otherwise, the estate or personal representative of an officer.

(6) "Party" includes an individual who was, is or is threatened to be made a named defendant or respondent in a proceeding.

(7) "Proceeding" means any threatened, pending or completed

action, suit or proceeding whether civil, criminal, administrative or investigative and whether formal or informal. [1989 c.1010 § 98]

OFFICIAL COMMENT TO ORS 65.387 (MODEL ACT § 8.50)

(1) *Proposed Changes to the Model Act*: The Model Act provision has been modified to parallel the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions*: ORS Chapter 61 has no definitions relating particularly to indemnification, but ORS 61.205 has phrases similar to much of the defined material in the proposal.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal parallels ORS 60.387.

65.391 AUTHORITY TO INDEMNIFY

(1) Except as provided in subsection (4) of this section, a corporation may indemnify an individual made a party to a proceeding because the individual is or was a director against liability incurred in the proceeding if:

(a) The conduct of the individual was in good faith;

(b) The individual reasonably believed that the individual's conduct was in the best interests of the corporation, or at least not opposed to its best interests; and

(c) In the case of any criminal proceeding, the individual had no reasonable cause to believe the conduct of the individual was unlawful.

(2) A director's conduct with respect to an employee benefit plan for a purpose the director reasonably believed to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirements of paragraph (b) of subsection (1) of this section.

(3) The termination of a proceeding by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this section.

(4) A corporation may not indemnify a director under this section:

(a) In connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or

(b) In connection with any other proceeding charging improper personal benefit to the director in which the director was adjudged liable on the basis that personal benefit was improperly received by the director.

(5) Indemnification permitted under this section in connection with a proceeding by or in the right of the corporation is limited to reasonable expenses incurred in connection with the proceeding. [1989 c.1010 § 99]

OFFICIAL COMMENT TO ORS 65.391 (MODEL ACT § 8.51)

(1) *Proposed Changes to the Model Act:* The Model Act has been modified to parallel the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions:* The provisions are similar in scope to those enacted as part of the 1987 amendments to Chapter 61.

(3) *Relationship to the Oregon Business Corporation Act:* The proposal parallels ORS 60.391.

65.394 MANDATORY INDEMNIFICATION

Unless limited by its articles of incorporation, a corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the director was a party because of being a director of the corporation against reasonable expenses actually incurred by the director in connection with the proceeding. [1989 c.1010 § 100]

OFFICIAL COMMENT TO ORS 65.394 (MODEL ACT § 8.52)

(1) *Proposed Changes to the Model Act:* Minor language changes have been made to parallel the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions:* The proposal corresponds to ORS 61.205(3), but adds the requirement that the director be wholly successful, on the merits or otherwise, to be entitled to mandatory indemnification.

(3) *Relationship to the Oregon Business Corporation Act:* The proposal parallels ORS 60.394.

65.397 ADVANCE FOR EXPENSES

(1) A corporation may pay for or reimburse the reasonable ex-

penses incurred by a director who is a party to a proceeding in advance of final disposition of the proceeding if:

(a) The director furnishes the corporation a written affirmation of the director's good faith belief that the director has met the standard of conduct described in ORS 65.391; and

(b) The director furnishes the corporation a written undertaking, executed personally or on the director's behalf, to repay the advance if it is ultimately determined that the director did not meet the standard of conduct.

(2) The undertaking required by paragraph (b) of subsection (1) of this section must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to financial ability to make repayment.

(3) Any authorization of payments under this section may be made by provision in the articles of incorporation or bylaws, by a resolution of the members or board of directors or by contract. [1989 c.1010 § 101]

OFFICIAL COMMENT TO ORS 65.397 (MODEL ACT § 8.53)

(1) *Proposed Changes to the Model Act:* The Model Act has been modified to parallel the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions:* The proposal expands on ORS 61.215 and adds as a prerequisite that the director provide a written affirmation concerning the director's conduct.

(3) *Relationship to the Oregon Business Corporation Act:* The proposal parallels ORS 60.397.

65.401 COURT-ORDERED INDEMNIFICATION

Unless the corporation's articles of incorporation provide otherwise, a director of the corporation who is a party to a proceeding may apply for indemnification to the court conducting the proceeding or to another court of competent jurisdiction. On receipt of an application, the court after giving any notice the court considers necessary may order indemnification in the amount it considers proper if it determines:

(1) The director is entitled to mandatory indemnification under ORS 65.394, in which case the court shall also order the corporation to pay the director's reasonable expenses incurred to obtain court-ordered indemnification; or

(2) The director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not the director met the standard of conduct set forth in ORS 65.391 (1) or was adjudged liable as described in ORS 65.391 (4), whether the liability is based on a judgment, settlement or proposed settlement or otherwise. [1989 c.1010 § 102]

OFFICIAL COMMENT TO ORS 65.401 (MODEL ACT § 8.54)

(1) *Proposed Changes to the Model Act:* The Model Act has been modified to parallel the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions:* Chapter 61 contains no provisions providing standards for court-ordered indemnification.

(3) *Relationship to the Oregon Business Corporation Act:* The proposal parallels ORS 60.401.

65.404 DETERMINATION AND AUTHORIZATION OF INDEMNIFICATION

(1) A corporation may not indemnify a director under ORS 65.391 unless authorized in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because the director has met the standard of conduct set forth in ORS 65.391.

(2) A determination that indemnification of a director is permissible shall be made:

(a) By the board of directors by majority vote of a quorum consisting of directors not at the time parties to the proceeding;

(b) If a quorum cannot be obtained under paragraph (a) of this subsection, by a majority vote of a committee duly designated by the board of directors, consisting solely of two or more directors not at the time parties to the proceeding;

(c) By special legal counsel selected by the board of directors or its committee in the manner prescribed in paragraph (a) or (b) of this subsection or, if a quorum of the board cannot be obtained under paragraph (a) of this subsection and a committee cannot be designated under paragraph (b) of this subsection, the special legal counsel shall be selected by majority vote of the full board of directors including directors who are parties to the proceeding; or

(d) By the members of a mutual benefit corporation, but direc-

tors who are at the time parties to the proceeding may not vote on the determination.

(3) Authorization of indemnification and evaluation as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible, except that if the determination is made by special legal counsel, authorization of indemnification and evaluation as to reasonableness of expenses shall be made by those entitled under paragraph (c) of subsection (2) of this section to select counsel.

(4) A director of a public benefit corporation may not be indemnified until 20 days after the effective date of written notice to the Attorney General of the proposed indemnification. [1989 c.1010 § 103]

OFFICIAL COMMENT TO ORS 65.404 (MODEL ACT § 8.55)

(1) *Proposed Changes to the Model Act:* The Model Act has been modified to parallel the Business Corporation Act, with the exception that Model Act subsections (b)(4) and (d), pertaining to mutual benefit corporations and public benefit corporations, have been retained.

(2) *Effective Changes from Chapter 61 Provisions:* The proposal corresponds to ORS 61.215.

(3) *Relationship to the Oregon Business Corporation Act:* The proposal parallels ORS 60.404.

65.407 INDEMNIFICATION OF OFFICERS, EMPLOYEES AND AGENTS

Unless a corporation's articles of incorporation provide otherwise:

(1) An officer of the corporation is entitled to mandatory indemnification under ORS 65.394, and is entitled to apply for court-ordered indemnification under ORS 65.401 in each case, to the same extent as a director under ORS 65.394 and 65.401.

(2) The corporation may indemnify and advance expenses under ORS 65.387 to 65.411 an officer, employee or agent of the corporation who is not a director to the same extent as to a director. [1989 c.1010 § 104]

OFFICIAL COMMENT TO ORS 65.407 (MODEL ACT § 8.56)

(1) *Proposed Changes to the Model Act*: The Model Act has been modified to parallel the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions*: Chapter 61 does not contain a separate section covering indemnification of officers, employees and agents. Such individuals are included with directors under the current statute.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal parallels ORS 60.407.

65.411 INSURANCE

A corporation may purchase and maintain insurance on behalf of an individual against liability asserted against or incurred by the individual who is or was a director, officer, employee or agent of the corporation, or who, while a director, officer, employee or agent of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee or agent of another foreign or domestic business or nonprofit corporation, partnership, joint venture, trust, employee benefit plan or other enterprise. The corporation may purchase and maintain the insurance even if the corporation has no power to indemnify the individual against the same liability under ORS 65.391 or 65.394. [1989 c.1010 § 105]

OFFICIAL COMMENT TO ORS 65.411 (MODEL ACT § 8.57)

(1) *Proposed Changes to the Model Act*: The Model Act has been modified to track the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal corresponds to ORS 61.215.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal parallels ORS 60.411.

65.414 APPLICATION OF ORS 65.387 TO 65.411

(1) The indemnification and provisions for advancement of expenses provided by ORS 65.387 to 65.411 shall not be deemed exclusive of any other rights to which directors, officers, employees or agents may be entitled under the corporation's articles of incorporation or bylaws, any agreement, general or specific action of its board of directors, vote of members or otherwise, and shall continue as to a person who has ceased to be a director, officer, employee or

agent and shall inure to the benefit of the heirs, executors and administrators of such a person. Specifically and not by way of limitation, a corporation shall have the power to make or agree to make any further indemnification, including advancement of expenses, of:

(a) Any director as authorized by the articles of incorporation, any bylaws approved, adopted or ratified by the members or any resolution or agreement approved, adopted or ratified, before or after such indemnification or agreement is made, by the members, provided that no such indemnification shall indemnify any director from or on account of acts or omissions for which liability could not be eliminated under ORS 65.047 (2)(c); and

(b) Any officer, employee or agent who is not a director as authorized by its articles of incorporation or bylaws, general or specific action of its board of directors or agreement. Unless the articles of incorporation, or any such bylaws, agreement or resolution provide otherwise, any determination as to any further indemnity under this paragraph shall be made in accordance with ORS 65.404.

(2) If articles of incorporation limit indemnification or advance of expenses, any indemnification and advance of expenses are valid only to the extent consistent with the articles of incorporation.

(3) ORS 65.387 to 65.411 do not limit a corporation's power to pay or reimburse expenses incurred by a director in connection with the director's appearance as a witness in a proceeding at a time when the director has not been made a named defendant or respondent to a proceeding.

(4) A report of indemnification must be made in accordance with ORS 65.784. [1989 c.1010 § 106; 1991 c.231 § 9]

OFFICIAL COMMENT TO ORS 65.414 (MODEL ACT § 8.58)

(1) *Proposed Changes to the Model Act*: The proposal deviates greatly from the Model Act to adopt the approach of the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal expands upon and goes further than ORS 61.215(3).

(3) *Relationship to the Oregon Business Corporation Act*: The proposal parallels ORS 60.414.

OFFICIAL COMMENT TO 1991 LEGISLATIVE AMENDMENT

The new provision is designed to serve as an aid in locating the related reporting provisions.

AMENDMENT OF ARTICLES OF INCORPORATION AND BYLAWS

(AMENDMENT OF ARTICLES OF INCORPORATION)

65.431 AUTHORITY

(1) A corporation may amend its articles of incorporation at any time to add, change or delete any provision if the articles of incorporation as amended would be permitted under ORS 65.431 to 65.467 as of the effective date of the amendment.

(2) A corporation designated on the records of the Office of the Secretary of State as a public benefit or religious corporation may amend or restate its articles of incorporation so that it becomes designated as a mutual benefit corporation only if notice, including a copy of the proposed amendment or restatement, has been delivered to the Attorney General at least 20 days before consummation of the amendment or restatement. [1989 c.1010 § 107]

OFFICIAL COMMENT TO ORS 65.431 (MODEL ACT § 10.01)

(1) *Proposed Changes to the Model Act*: This section has been reworded to follow the language of the Business Corporation Act. This eliminates the awkward reference to the power to "change a provision that is required" which may suggest the provision is not actually required. An additional subsection has been added at the request of the Attorney General, requiring notice to the Attorney General 20 days before a corporation designated as a public benefit or religious corporation may amend or restate its articles to become a mutual benefit corporation.

(2) *Effective Changes from Chapter 61 Provisions*: The language of ORS 61.355 does not specifically refer to amendments which add, change, or delete provisions. It also refers to provisions which are "lawful" rather than provisions which are "permitted." The substantive effect, however, of ORS 61.355 and of Model Act § 10.01, as revised in ORS 65.431, is the same, except for the added requirement of 20 days notice to the Attorney General of certain amendments.

(3) *Relationship to the Oregon Business Corporation Act*: The language from ORS 60.431(1) has been adopted.

65.434 AMENDMENT BY DIRECTORS

(1) Unless the articles provide otherwise, a corporation's board of directors may adopt one or more amendments to the corporation's articles without member approval:

(a) To extend the duration of the corporation if it was incorporated at a time when limited duration was required by law;

(b) To delete the names and addresses of the initial directors and incorporators;

(c) To delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the Office of the Secretary of State;

(d) To delete the mailing address if an annual report has been filed with the Office of the Secretary of State;

(e) To change the corporate name by adding, changing or deleting the word "corporation," "incorporated," "company," "limited" or the abbreviation "corp.," "inc.," "co." or "ltd.," for a similar word or abbreviation in the name, or by adding, deleting or changing a geographical attribution to the name;

(f) To include a statement of whether the corporation is a public benefit, mutual benefit or religious corporation; or

(g) To make any other change expressly permitted by this chapter to be made by director action.

(2) If a corporation has no members entitled to vote on articles, its incorporators, until directors have been chosen, and thereafter its board of directors, may adopt one or more amendments to the corporation's articles subject to any approval required pursuant to ORS 65.467. The corporation shall provide notice of any meeting at which an amendment is to be voted upon. The notice shall be in accordance with ORS 65.344 (2). The notice must also state that the purpose, or one of the purposes, of the meeting is to consider a proposed amendment to the articles and contain or be accompanied by a copy or summary of the amendment or state the general nature of the amendment. Unless the articles or bylaws require a greater vote or the board of directors requires a greater vote, the amendment must be approved by a majority of the directors in office at the time the amendment is adopted. Any number of amendments may

be submitted and voted upon at any one meeting. [1989 c.1010 § 108; 1991 c.231 § 10]

OFFICIAL COMMENT TO ORS 65.434 (MODEL ACT § 10.02)

(1) *Proposed Changes to the Model Act*: Adds as a new subsection (1)(f) the authority of the board to add a statement in the articles indicating which of the three types of nonprofit corporation the corporation is. Adds as final sentence of subsection (2) language taken from ORS 61.361(2).

(2) *Effective Changes from Chapter 61 Provisions*: Subsection (1) sets out a procedure for amendments which the board of directors may adopt without member or third person approval because they do not adversely affect members' rights or the rights of third persons specified under ORS 65.467, Model Act § 10.30. There is no such procedure in ORS Chapter 61. Subsection (2) applies when there are no members with the power to vote on articles. Unlike its counterpart, ORS 61.361(1)(b), subsection (2) permits incorporators to adopt amendments until directors have been chosen, requires the form of meeting notice to include information on the proposed amendments, and makes adoption subject to approval by specified third persons under ORS 65.467, Model Act § 10.30.

(3) *Relationship to the Oregon Business Corporation Act*: Except for paragraphs (d) and (f), subsection (1) is taken directly from the Model Business Corporation Act (ORS 60.434).

(4) *Other Comments*: Although subsection (1) adds some complexity by specifying the technical instances when member or third party approval is not required, it simplifies the amendment procedure. Note also that subsection (1) is permissive and that its effect can be avoided, if desired, by a provision in the articles.

Subsection (1)(f) has been added to encourage corporations to elect whether they will be public benefit, mutual benefit, or religious corporations. This is expected to be especially helpful during the transition period after adoption of the new Oregon Nonprofit Corporation Act.

The notice requirement for board meetings at which an amendment will be considered is new but is similar to the notice requirement of ORS 61.361(1)(a) for amendments to be adopted by members.

Allowing approval by specified third persons gives greater flexi-

bility. It permits a nonprofit "subsidiary," for example, to have its articles subject to the veto of its "parent," without the parent being the sole member of the subsidiary.

OFFICIAL COMMENT TO 1991 LEGISLATIVE AMENDMENT

The new language clarifies that a greater than majority vote may be required in connection with amendments.

65.437 AMENDMENT BY BOARD OF DIRECTORS AND MEMBERS

(1) Unless this chapter, the articles, bylaws, the members, acting pursuant to subsection (2) of this section, or the board of directors acting pursuant to subsection (3) of this section, require a greater vote or voting by class, an amendment to a corporation's articles to be adopted must be approved:

(a) By the board if the corporation is a public benefit or religious corporation and the amendment does not relate to the number of directors, the composition of the board, the term of office of directors or the method or way in which directors are elected or selected;

(b) Except as provided in ORS 65.434 (1), by the members entitled to vote on articles by at least two-thirds of the votes cast or a majority of the voting power, whichever is less; and

(c) In writing by any person or persons whose approval is required for an amendment to the articles as authorized by ORS 65.467.

(2) The members entitled to vote on articles may condition the amendment's adoption on receipt of a higher percentage of affirmative votes or on any other basis.

(3) If the board initiates an amendment to the articles or board approval is required by subsection (1) of this section to adopt an amendment to the articles, the board may condition the amendment's adoption on receipt of a higher percentage of affirmative votes or on any other basis. For the amendment to be adopted, the board of directors shall, except in those cases described in paragraph (a) of subsection (1) of this section, adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of members, which may be either an annual or special meeting.

(4) If the board or the members entitled to vote on articles seek to have the amendment approved by such members at a membership

meeting, the corporation shall give notice to such members of the proposed membership meeting in writing in accordance with ORS 65.214. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy or summary of the amendment.

(5) If the board or the members entitled to vote on articles seek to have the amendment approved by such members by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the amendment. [1989 c.1010 § 109]

OFFICIAL COMMENT TO ORS 65.437 (MODEL ACT § 10.03)

(1) *Proposed Changes to the Model Act:* Terminology has been modified to be consistent with parallel provisions of the Business Corporation Act, including the addition to subsection (1) of language based on ORS 60.437(2) (as the Business Corporation Task Force has suggested it be amended). Because the voting rights of members may vary by class, a more specific reference to the type of voting power has been added.

(2) *Effective Changes from Chapter 61 Provisions:* Most of the procedures included in this section are new and thus not included in ORS Chapter 61. One change to ORS 61.361(1)(a) is that under subsection (1)(b) members adopt an amendment at a meeting by two-thirds of the votes cast or a majority of the voting power, whichever is less. ORS 61.361(1)(a), by contrast, provides for adoption by two-thirds of the votes present and entitled to be cast at the meeting. The effect of the change is to require less than a two-thirds vote only when more than three-quarters of the votes entitled to be cast are present at the meeting.

New provisions are that (1) the affirmative vote required under the Act may be increased by the board or by members with the power to vote on articles, (2) board approval is required for many article amendments for public benefit or religious corporations, (3) approval by any specified third person under ORS 65.467 (Model Act § 10.30) is required, (4) approval may be made subject to a condition, and (5) notice requirements are specified for a vote by written ballot or consent.

(3) *Relationship to the Oregon Business Corporation Act:* There

are significant differences from Chapter 60, mainly deriving from the different features of nonprofit corporations, e.g., approvals by specified third parties, approval by the board of a public benefit or religious corporation, and notice requirements for action by written ballot.

(4) *Other Comments:* Making approval subject to a condition is one of the most interesting changes made by this section. It permits both the members and the board to require a greater voting majority than otherwise required, or to condition the amendment, for example, on the occurrence of some outside event or third party action. The power to condition offers additional flexibility.

65.441 CLASS VOTING BY MEMBERS ON AMENDMENTS

(1) In a public benefit corporation the members of a class entitled to vote on articles are entitled to vote as a class on a proposed amendment to the articles if the amendment would affect the rights of that class as to voting in a manner different than the amendment would affect another class or members of another class.

(2) In a mutual benefit corporation the members of a class entitled to vote on articles are entitled to vote as a class on a proposed amendment to the articles if the amendment would:

(a) Affect the rights, privileges, preferences, restrictions or conditions of that class as to voting, dissolution, redemption or transfer of memberships in a manner different than such amendment would affect another class;

(b) Change the rights, privileges, preferences, restrictions or conditions of that class as to voting, dissolution, redemption or transfer by changing the rights, privileges, preferences, restrictions or conditions of another class;

(c) Increase or decrease the number of memberships authorized for that class;

(d) Increase the number of memberships authorized for another class;

(e) Effect an exchange, reclassification or termination of the memberships of that class; or

(f) Authorize a new class of memberships.

(3) In a religious corporation the members of a class entitled to vote on articles are entitled to vote as a class on a proposed amend-

ment to the articles only if a class vote is provided for in the articles or bylaws.

(4) If a class is to be divided into two or more classes as a result of an amendment to the articles of a public benefit or mutual benefit corporation, the amendment must be approved by the members of each class entitled to vote on articles that would be created by the amendment.

(5) Except as provided in the articles or bylaws of a religious corporation, if a class vote is required to approve an amendment to the articles of a corporation, the amendment must be approved by the members of the class entitled to vote on articles by two-thirds of the votes cast by the class or a majority of the voting power of the class, whichever is less.

(6) A class of members of a public benefit or mutual benefit corporation is entitled to the voting rights granted by this section although the articles and bylaws provide that the class may not vote on the proposed amendment. [1989 c.1010 § 110]

OFFICIAL COMMENT TO ORS 65.441 (MODEL ACT § 10.04)

(1) *Proposed Changes to the Model Act*: No major changes are proposed, except clarification of the voting rights of a member because voting rights of members may vary by class.

(2) *Effective Changes from Chapter 61 Provisions*: This section goes well beyond ORS 61.091 and specifies how class voting will work for voting on articles in the three types of nonprofit corporation.

(3) *Relationship to the Oregon Business Corporation Act*: Language of this section is similar to provisions in ORS 60.441. See ORS 60.441(1)(a), (b), (d) and (g) and 60.441(4).

(4) *Other Comments*: Because the Model Act does provide for class voting, it is appropriate to include this section to protect the voting rights of class members.

65.447 ARTICLES OF AMENDMENT

A corporation amending its articles shall deliver for filing to the Office of the Secretary of State articles of amendment setting forth:

- (1) The name of the corporation.
- (2) The text of each amendment adopted.
- (3) The date of each amendment's adoption.

(4) If approval of members was not required, a statement to that effect and a statement that the amendment was approved by a sufficient vote of the board of directors or incorporators.

(5) If approval by members entitled to vote on articles was required:

(a) The designation and number of members of, and number of votes entitled to be cast by, each class entitled to vote separately on the amendment; and

(b) The total number of votes cast for and against the amendment by each class entitled to vote separately on the amendment.

(6) If approval of the amendment by some person or persons other than the members entitled to vote on articles, the board or the incorporators is required pursuant to ORS 65.467, a statement that the approval was obtained. [1989 c.1010 § 111]

OFFICIAL COMMENT TO ORS 65.447 (MODEL ACT § 10.05)

(1) *Proposed Changes to the Model Act*: The deletions proposed make this section more consistent with the Business Corporation Act, ORS 60.447(2). The deleted language, according to the Official Comment to Model Act § 10.05, supposedly allows reporting of an approximate vote with a statement that the vote is sufficient for approval by the class. The language, however, does not carry out the intent expressed in the comment. It also may be questioned as to what is an "undisputed" vote. There is a modification of "member" to refer to the specific voting rights involved.

(2) *Effective Changes from Chapter 61 Provisions*: Unlike ORS 61.370, the proposal does not include the details of how the amendment was adopted, e.g., for members, at a meeting, with a quorum, by at least two-thirds vote of those present in person or by proxy or by a unanimous written consent. The equivalent details are in ORS 65.437, Model Act § 10.03.

(3) *Relationship to the Oregon Business Corporation Act*: This section has been revised to closely follow ORS 60.447.

65.451 RESTATED ARTICLES OF INCORPORATION

(1) A corporation's board of directors may restate its articles of incorporation at any time with or without approval by members or any other person.

(2) The restatement may include one or more amendments to the

articles. If the restatement includes an amendment requiring approval by the members entitled to vote on articles or any other person, it must be adopted as provided in ORS 65.437.

(3) If the board seeks to have the restatement approved by such members at a membership meeting, the corporation shall give written notice to such members of the proposed membership meeting in accordance with ORS 65.214. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the proposed restatement and contain or be accompanied by a copy or summary of the restatement that identifies any amendments or other change it would make in the articles.

(4) If the board seeks to have the restatement approved by such members by written ballot or written consent, the material soliciting the approval shall contain or be accompanied by a copy or summary of the restatement that identifies any amendments or other change it would make in the articles.

(5) A restatement requiring approval by such members must be approved by the same vote as an amendment to articles under ORS 65.437.

(6) A corporation restating its articles of incorporation shall deliver to the Office of the Secretary of State for filing articles of restatement setting forth the name of the corporation and the text of the restated articles of incorporation together with a certificate setting forth:

(a) Whether the restatement contains an amendment to the articles requiring approval by the members entitled to vote on articles or any other person other than the board of directors and, if it does not, that the board of directors adopted the restatement, or if the restatement contains an amendment to the articles requiring approval by the members, the information required by ORS 65.447; and

(b) If the restatement contains an amendment to the articles requiring approval by a person whose approval is required pursuant to ORS 65.467, a statement that such approval was obtained.

(7) Restated articles of incorporation shall include all statements required to be included in original articles of incorporation except that no statement is required to be made with respect to:

(a) The names and addresses of the incorporators or the initial or present registered office or agent; or

(b) The mailing address of the corporation if an annual report has been filed with the Office of the Secretary of State.

(8) Duly adopted restated articles of incorporation supersede the original articles of incorporation and all amendments to them.

(9) The Secretary of State may certify restated articles of incorporation, as the articles of incorporation currently in effect, without including the certificate information required by subsection (6) of this section. [1989 c.1010 § 112]

OFFICIAL COMMENT TO ORS 65.451 (MODEL ACT § 10.06)

(1) *Proposed Changes to the Model Act*: Redundant language has been deleted. Each reference to "member" has been clarified because voting rights of members may vary by class. Language has been added to parallel a proposal by the Business Corporation Task Force to amend the corresponding business corporation statute, ORS 60.451.

(2) *Effective Changes from Chapter 61 Provisions*: The board of directors may adopt restated articles which do not include new amendments without going to the members or other party entitled to approve amendments. This allows the board to consolidate previously approved amendments in restated articles without the formal approval of the members or other party. The detailed statements of the voting procedure required by ORS 61.385(3) have been deleted. Also, the Secretary of State is authorized to certify restated articles without including information on the manner of adoption.

(3) *Relationship to the Oregon Business Corporation Act*: Model Act § 10.06 closely follows ORS 60.451, and the proposal has been amended to more closely follow ORS 60.451.

(4) *Other Comments*: This section makes technical improvements without major substantive change.

65.454 AMENDMENT PURSUANT TO COURT ORDER

(1) A corporation's articles may be amended without board approval or approval by the members entitled to vote on articles, or approval required pursuant to ORS 65.467:

(a) To carry out a plan of reorganization ordered or decreed by a court of competent jurisdiction under federal statute; or

(b) In a proceeding brought by the Attorney General in the Cir-

cuit Court for Marion County to correct the statement in the articles of incorporation or the annual report with regard to whether the corporation is a public benefit or mutual benefit corporation or, subject to the provisions of ORS 65.042, a religious corporation.

(2) The articles after amendment shall contain only provisions required or permitted by ORS 65.047.

(3) The individual or individuals designated by the court in a reorganization proceeding, or the Attorney General in a proceeding brought by the Attorney General, shall deliver to the Office of the Secretary of State for filing articles of amendment setting forth:

- (a) The name of the corporation;
- (b) The text of each amendment approved by the court;
- (c) The date of the court's order or decree approving the articles of amendment;
- (d) The title of the proceeding in which the order or decree was entered; and
- (e) A statement whether the court had jurisdiction of the proceeding under federal statute or under paragraph (b) of subsection (1) of this section.

(4) This section does not apply after entry of a final decree in the reorganization proceeding even though the court retains jurisdiction of the proceeding for limited purposes unrelated to consummation of the reorganization plan. [1989 c.1010 § 113]

OFFICIAL COMMENT TO ORS 65.454 (MODEL ACT § 10.07)

(1) *Proposed Changes to the Model Act:* At the request of the Attorney General, a provision has been added allowing the Attorney General to bring a court proceeding to challenge the corporation's self-designated character as public benefit, mutual benefit, or religious. Minor changes were made, including clarification of "members" who have voting rights.

(2) *Effective Changes from Chapter 61 Provisions:* ORS 61.373 is considerably more wordy, without any significant difference in effect. ORS 61.373(2) consists of examples that are arguably helpful but are not really needed by the Bankruptcy Court to spell out its power. ORS 61.375(3)(b) and (4) describe a procedure and effective date that are not recommended for retention because they do not appear to be necessary.

The proposal adds an Attorney General proceeding in paragraph

(1)(b). The proposal also adds a new provision in subsection (4) which limits the section to the period prior to the entry of a final decree in the reorganization proceeding.

(3) *Relationship to the Oregon Business Corporation Act:* This section, except for the Attorney General proceeding, is closely patterned after ORS 60.454.

(4) *Other Comments:* This provision, under which the Bankruptcy Court will make all the decisions, is seldom used, and the Attorney General proceeding will be used only in unusual cases of fraud. The cross-reference in paragraph (1)(b) to ORS 65.042 is intended as a reminder of the constitutional constraints limiting the Attorney General's challenges to a corporation's claim that it is religious.

65.457 EFFECT OF AMENDMENT AND RESTATEMENT

An amendment to articles of incorporation does not affect a cause of action existing against or in favor of the corporation, a proceeding to which the corporation is a party, any requirement or limitation imposed upon the corporation or any property held by it by virtue of any trust upon which such property is held by the corporation or the existing rights of persons other than members of the corporation. An amendment changing a corporation's name does not abate a proceeding brought by or against the corporation in its former name. [1989 c.1010 § 114]

OFFICIAL COMMENT TO ORS 65.457 (MODEL ACT § 10.08)

- (1) *Proposed Changes to the Model Act:* None.
- (2) *Effective Changes from Chapter 61 Provisions:* No significant substantive change except for the reference to trusts under which the corporation may hold property. ORS 61.380 refers to a "pending action" while the proposal refers to a "proceeding."
- (3) *Relationship to the Oregon Business Corporation Act:* The section closely follows ORS 60.457 but also provides that the amendment does not affect any trust under which the corporation may hold property.

(AMENDMENT OF BYLAWS)

65.461 AMENDMENT BY DIRECTORS

Unless otherwise provided in its articles or bylaws, a corporation

with no members with the power to vote on bylaws shall amend its bylaws as provided in this section. The corporation's incorporators, until directors have been chosen, and thereafter its board of directors may adopt one or more amendments to the corporation's bylaws subject to any approval required pursuant to ORS 65.467. The corporation shall provide notice of any meeting of directors at which an amendment is to be approved. The notice shall be in accordance with ORS 65.344 (2). The notice must also state that the purpose, or one of the purposes, of the meeting is to consider a proposed amendment to the bylaws and contain or be accompanied by a copy or summary of the amendment or state the general nature of the amendment. [1989 c.1010 § 115]

OFFICIAL COMMENT TO ORS 65.461 (MODEL ACT § 10.20)

(1) *Proposed Changes to the Model Act*: One change is deletion of the requirement that bylaws be approved by a majority of the board then in office rather than by a majority of a quorum. There is also reference to an alternative method of adoption which may be specified in the articles or bylaws.

(2) *Effective Changes from Chapter 61 Provisions*: This section is more restrictive than ORS 61.095 because this section requires a specific time and content of notice for the directors' meeting at which bylaws are to be adopted. Under ORS 61.145, however, no particular advance notice or content of notice is required for directors' meetings. *See also* Model Act § 8.22(b), as amended in ORS 65.344(2).

Note that incorporators may act as directors to amend bylaws until the directors are chosen.

Under this section the procedure for amendment of bylaws generally follows the procedure for amendment of articles. *See* Model Act § 10.02(b).

(3) *Relationship to the Oregon Business Corporation Act*: There is no corresponding provision in Chapter 60 because a business corporation always has shareholders following its initial organization.

(4) *Other Comments*: The more restrictive approach of the Model Act is retained, but an initial amendment has been added to the section. This allows a corporation without members which prefers Chapter 61's, or some other approach to bylaw adoption, to opt

out by a provision in its articles or bylaws. *See* other comments to ORS 65.434.

65.464 AMENDMENT BY DIRECTORS AND MEMBERS

(1) A corporation's board of directors may amend or repeal the corporation's bylaws unless:

(a) The articles of incorporation or this chapter reserve this power exclusively to the members, or to a party authorized under ORS 65.467, or both, in whole or in part; or

(b) The members entitled to vote on bylaws, in amending or repealing a particular bylaw, provide expressly that the board of directors may not amend or repeal that bylaw.

(2) A corporation's members entitled to vote on bylaws, subject to ORS 65.467, may amend or repeal the corporation's bylaws even though the bylaws may also be amended or repealed by its board of directors. [1989 c.1010 § 116]

OFFICIAL COMMENT TO ORS 65.464 (MODEL ACT § 10.21)

(1) *Proposed Changes to the Model Act*: Delete language of Model Act § 10.21 and replace with language adapted from ORS 60.461.

(2) *Effective Changes from Chapter 61 Provisions*: Chapter 61 takes the approach that the board of directors shall have the power to adopt or amend the bylaws, unless otherwise provided in the articles or the bylaws. There is no specific statutory procedure for adoption or amendment of bylaws. Thus the Model Act presents a considered and logical procedure which protects a member's rights, but does so at the expense of the flexibility existing under current Oregon law. The Official Comment to the Model Act states that the rationale for the restriction is that basic rights of a member are usually set forth in the corporation's bylaws.

(3) *Relationship to the Oregon Business Corporation Act*: Chapter 60 follows an approach closer to Chapter 61 than to the Model Act. ORS 60.461 provides that the board of directors has the power to amend unless otherwise specified. ORS 60.461(1)(b) and (2) provide further flexibility by providing for a dual power of amendment with a "tiebreaker" provision.

(4) *Other Comments*: The policy decision is whether the Model Act's concern that bylaw amendment be regulated to protect mem-

bers is more important than the flexibility and simplicity of ORS 61.095. The Business Corporation Act is closer to ORS 61.095. Because member protection can be achieved through the articles or through optional provisions in the bylaws which give members a voice in amendment, the detailed regulatory approach of Model Act § 10.21 has not been chosen. Instead, the approach of the Business Corporation Act has been followed, providing a default provision for those corporations which do not specify in their articles how the bylaws may be amended.

Note - The proposal omits Model Act § 10.22 (class voting by members on amendments).

65.467 APPROVAL BY THIRD PERSONS

The articles may require an amendment to the articles or bylaws to be approved in writing by a specified person or persons other than the board. Such an article provision may not be amended without the approval in writing of such person or persons. [1989 c.1010 § 117]

OFFICIAL COMMENT TO ORS 65.467 (MODEL ACT § 10.30)

(1) *Proposed Changes to the Model Act*: Minor stylistic change.

(2) *Effective Changes from Chapter 61 Provisions*: There is no comparable provision in Chapter 61. It could be argued that articles' provisions implementing this section are already permitted under ORS 61.311(1)(c) as "provisions, not inconsistent with law . . . for the regulation of the internal affairs of the corporation . . ." This section removes any remaining questions of validity and also may suggest an additional structural feature which can be employed to advantage.

(3) *Relationship to the Oregon Business Corporation Act*: There is no direct counterpart in Chapter 60, although the result is similar to that which could be reached by employing a preferred class of stock.

(4) *Other Comments*: The increased flexibility and the benefits described in the Official Comment to Model Act § 10.30 justify its retention.

Note - The proposal omits Model Act optional § 10.31 (amendment terminating members or redeeming or canceling membership).

MERGER

65.481 APPROVAL OF PLAN OF MERGER

(1) Subject to the limitations set forth in ORS 65.484, one or more nonprofit corporations may merge with a business or nonprofit corporation, if the plan of merger is approved as provided in ORS 65.487.

(2) The plan of merger must set forth:

(a) The name of each business or nonprofit corporation planning to merge and the name of the surviving corporation into which each other corporation plans to merge;

(b) The terms and conditions of the merger;

(c) The manner and basis, if any, of converting the memberships of each public benefit or religious corporation into memberships of the surviving corporation; and

(d) If the merger involves a mutual benefit or business corporation, the manner and basis, if any, of converting the memberships or shares of each merging corporation into memberships, obligations, shares or other securities of the surviving or any other corporation or into cash or other property in whole or part.

(3) The plan of merger may set forth:

(a) Amendments to the articles of incorporation of the surviving corporation; and

(b) Other provisions relating to the merger. [1989 c.1010 § 118]

OFFICIAL COMMENT TO ORS 65.481 (MODEL ACT § 11.01)

(1) *Proposed Changes to the Model Act*: The Model Act has been modified to reflect the language of the Business Corporation Act where appropriate. Reference to "business corporations" has been inserted in appropriate places because the definition of "corporation" in ORS 65.001(8), Model Act § 1.40, refers only to nonprofit corporations.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal permits a nonprofit corporation to merge with either another nonprofit corporation or with a business corporation if certain conditions are met. See ORS 65.484, Model Act § 11.02. Mergers with foreign corporations are addressed in a separate section. See ORS 65.497, Model Act § 11.06. In addition to the items specified in ORS 61.455 to be covered in the plan of merger, the Model Act also

requires the manner and basis of converting memberships in the merging corporations to be set forth. Abandonment of a planned merger is addressed in ORS 65.487(7), Model Act § 11.03(g). The commentary to the Model Act explains that no provision has been included for consolidations because mergers are usually preferable and because the same result can be achieved by incorporating a new corporation which will be the surviving corporation in the merger. Accordingly, the proposal does not include a consolidation provision comparable to ORS 61.461.

(3) *Relationship to the Oregon Business Corporation Act:* Section 11.01 basically parallels ORS 60.481, with the addition of a distinction between public benefit and religious corporations and mutual benefit corporations with respect to conversion of memberships.

(4) *Other Comments:* The merger of a nonprofit corporation with a business corporation is authorized in the corporation statutes of several other states, including California and Delaware.

65.484 LIMITATIONS ON MERGERS BY PUBLIC BENEFIT OR RELIGIOUS CORPORATIONS

(1) Without the prior written consent of the Attorney General or the prior approval of the circuit court of the county where the corporation's principal office is located or, if the principal office is not in this state, where the registered office of the corporation is or was last located, in a proceeding in which the Attorney General has been given written notice, a public benefit or religious corporation may merge only with:

- (a) A public benefit or religious corporation;
- (b) A foreign corporation which would qualify under this chapter as a public benefit or religious corporation;
- (c) A wholly owned foreign or domestic business or mutual benefit corporation, provided the public benefit or religious corporation is the surviving corporation and continues to be a public benefit or religious corporation after the merger; or

(d) A foreign or domestic business or mutual benefit corporation, provided that:

(A) On or prior to the effective date of the merger, assets with a value equal to the greater of the fair market value of the net tangible and intangible assets, including good will, of the public benefit

or religious corporation or the fair market value of the public benefit or religious corporation if it were to be operated as a business concern are transferred or conveyed to one or more persons who would have received its assets under ORS 65.637 (1)(e) and (f) had it dissolved;

(B) It shall return, transfer or convey any assets held by it upon condition requiring return, transfer or conveyance, which condition occurs by reason of the merger, in accordance with such condition; and

(C) The merger is approved by a majority of directors of the public benefit or religious corporation who are not and will not become members or shareholders in, or officers, employees, agents or consultants of, the surviving corporation.

(2) Notice, including a copy of the proposed plan of merger, must be delivered to the Attorney General at least 20 days before consummation of any merger of a public benefit corporation or a religious corporation pursuant to paragraph (d) of subsection (1) of this section.

(3) Without the prior written consent of the Attorney General or the prior approval of the court specified in subsection (1) of this section in a proceeding in which the Attorney General has been given written notice, no member of a public benefit or religious corporation may receive or keep anything as a result of a merger other than a membership in the surviving public benefit or religious corporation. Where approval or consent is required by this section, it shall be given if the transaction is consistent with the purposes of the public benefit or religious corporation or is otherwise in the public interest. [1989 c.1010 § 119]

OFFICIAL COMMENT TO ORS 65.484 (MODEL ACT § 11.02)

(1) *Proposed Changes to the Model Act:* Subsection (1) has been revised to add flexibility by authorizing the Attorney General to consent to the merger of a public benefit or religious corporation with a mutual benefit or business corporation where the statutory exceptions are not available as an alternative to instituting a court proceeding. This change is parallel to the alternatives specified in subsection (3). The other modifications are in the nature of clerical or grammatical corrections or conforming changes to enhance internal consistency.

(2) *Effective Changes from Chapter 61 Provisions:* There is no comparable provision, as ORS 61.455 to 61.481 does not authorize the merger of a nonprofit corporation with a business corporation, and ORS chapter 61 does not distinguish among mutual benefit, public benefit, and religious corporations.

(3) *Relationship to the Oregon Business Corporation Act:* No comparable provision.

(4) *Other Comments:* Pursuant to subsection (1)(d)(C), the merger of a public benefit or religious corporation with a business or mutual benefit corporation imposes a special requirement of approval by disinterested directors in addition to the board approval required by ORS 65.487, Model Act § 11.03. The concept of limitations on the merger of a public benefit or religious corporation with a mutual benefit or business corporation derives from California Nonprofit Corporation Law §§ 6010 (public benefit), 8010 (mutual benefit), and 9640 (religious). The common law governing charitable gifts and trusts imposes comparable constraints. *See also* the Charitable Trust and Corporation Act, ORS 128.610 through 128.750.

65.487 ACTION ON PLAN BY BOARD, MEMBERS AND THIRD PERSONS

(1) Unless this chapter, the articles, bylaws or the board of directors or members, acting pursuant to subsection (3) of this section, require a greater vote or voting by class, adoption of a plan of merger requires, with respect to each corporation party to the merger, approval:

(a) By the board;

(b) By the members entitled to vote on the merger, if any, by at least two-thirds of the votes cast or a majority of the voting power, whichever is less; and

(c) In writing, by any person or persons whose approval is required for an amendment to the articles or bylaws by a provision of the articles, as authorized by ORS 65.467.

(2) If the corporation does not have members entitled to vote on the merger, the merger must be approved by a majority of the directors in office at the time the merger is approved. In addition, the corporation shall provide notice of any directors' meeting at which such approval is to be obtained in accordance with ORS 65.344 (2).

The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the proposed merger.

(3) The board of directors may condition its submission of the proposed merger to a vote of members, and the members entitled to vote on the merger may condition their approval of the merger, on receipt of a higher percentage of affirmative votes or on any other basis.

(4) If the board seeks to have the plan approved by the members at a membership meeting, the corporation shall give notice to its members of the proposed membership meeting in accordance with ORS 65.214. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger and contain or be accompanied by a copy or summary of the plan. The copy or summary of the plan for members of the surviving corporation shall include any provision that, if contained in a proposed amendment to the articles of incorporation or bylaws, would entitle members to vote on the provision. The copy or summary of the plan for members of each disappearing corporation shall include a copy or summary of the articles and bylaws which will be in effect immediately after the merger takes effect.

(5) If the board seeks to have the plan approved by the members by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the plan. The copy or summary of the plan for members of the surviving corporation shall include any provision that, if contained in a proposed amendment to the articles of incorporation or bylaws, would entitle members to vote on the provision. The copy or summary of the plan for members of each disappearing corporation shall include a copy or summary of the articles and bylaws which will be in effect immediately after the merger takes effect.

(6) Voting by a class of members is required on a plan of merger if the plan contains a provision that, if contained in a proposed amendment to the articles of incorporation, would entitle the class of members to vote as a class on the proposed amendment under ORS 65.441. The plan is approved by a class of members by two-thirds of the votes cast by the class or a majority of the voting power of the class, whichever is less.

(7) After a merger is adopted, and at any time before articles of merger are filed, the planned merger may be abandoned, subject to

any contractual rights, without further action by members or other persons who approved the plan, in accordance with the procedure set forth in the plan of merger or, if none is set forth, in the manner determined by the board of directors. [1989 c.1010 § 120]

OFFICIAL COMMENT TO ORS 65.487 (MODEL ACT § 11.03)

(1) *Proposed Changes to the Model Act*: Certain changes have been made in the Model Act to conform to the provisions of ORS 60.487 and to certain changes made in ORS 65.437 as compared with Model Act § 10.03. Because the voting rights of members may vary by class, a specific reference to the type of voting power involved has been added.

(2) *Effective Changes from Chapter 61 Provisions*: As discussed under the commentary to ORS 65.481, provisions for plans of consolidation have not been included in the Model Act, and mergers with foreign corporations are addressed in a separate section. The proposal effectively reduces the approval requirement by members to only a majority of the total votes entitled to be cast where more than 75 percent of such votes are present or represented. *See* commentary to ORS 65.437. This proposal gives the board of directors the power to determine to abandon the proposed merger without action by the members or other persons who approved the plan of merger if no procedure is set forth in the plan.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal corresponds to ORS 60.487, although the two diverge substantially due to differences in shareholder and member-related issues. The proposal requires approval by the members of each corporation which has members with the power to vote on mergers; the exception to shareholder approval included in ORS 60.487 is appropriate only in the business corporation context.

65.491 ARTICLES OF MERGER

(1) After a plan of merger is approved by the board of directors of each merging corporation and, if required by ORS 65.487, by the members and any other persons, the surviving corporation shall deliver to the Office of the Secretary of State for filing articles of merger setting forth:

- (a) The plan of merger.
- (b) If approval of members was not required, a statement to that

effect and a statement that the plan was approved by a sufficient vote of the board of directors of each corporation.

(c) If approval by the members of one or more corporations was required:

(A) The designation and number of members of, and number of votes entitled to be cast by, each class entitled to vote separately on the plan; and

(B) The total number of votes cast for and against the plan by each class entitled to vote separately on the plan.

(d) If approval of the plan by some person or persons other than the members or the board is required pursuant to ORS 65.487 (1)(c), a statement that the approval was obtained.

(2) Unless a delayed effective date is specified, a merger takes effect when the articles of merger are filed. [1989 c.1010 § 121]

OFFICIAL COMMENT TO ORS 65.491 (MODEL ACT § 11.04)

(1) *Proposed Changes to the Model Act*: Certain changes have been made in the Model Act to conform to the provisions of ORS 60.494 and to certain changes made in ORS 65.494 as compared with Model Act § 11.05. Also, approval by members refers only to members entitled to vote on a merger. The concept of acquiring a corporation is appropriate only to a share exchange in the business corporation context.

(2) *Effective Changes from Chapter 61 Provisions*: As discussed under the commentary to ORS 65.481, provisions for plans of consolidation have not been included in the Model Act and mergers with foreign corporations are addressed in a separate section. The items required to be set forth in the articles of merger by the Model Act differ from those specified in ORS 61.471 as appropriate to conform to the differences in approval requirements between ORS 65.487 (Model Act § 11.03) and ORS 61.465.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal generally parallels ORS 60.494, with certain variances relating to the differences in approval requirements. *See* ORS 65.504, which provides that any domestic business corporation which is a party to a merger pursuant to this Act shall comply with all applicable provisions of the Oregon Business Corporation Act which are not inconsistent with this Act.

65.494 EFFECT OF MERGER**When a merger takes effect:**

(1) Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases;

(2) The title to all real estate and other property owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment subject to any and all conditions to which the property was subject prior to the merger;

(3) The surviving corporation has all liabilities and obligations of each corporation party to the merger;

(4) A proceeding pending against any corporation party to the merger may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for the corporation whose existence ceased;

(5) The articles of incorporation and bylaws of the surviving corporation are amended to the extent provided in the plan of merger; and

(6) The memberships or shares of each nonprofit or business corporation party to the merger that are to be converted into memberships, obligations, shares or other securities of the surviving or any other corporation or into cash or other property are converted and the former holders of the memberships or shares are entitled only to the rights provided in the articles of merger. [1989 c.1010 § 122]

OFFICIAL COMMENT TO ORS 65.494 (MODEL ACT § 11.05)

(1) *Proposed Changes to the Model Act:* Subsection (6), which parallels ORS 60.497(1)(f), has been added. See ORS 65.481(2)(c) and (d), Model Act 11.01(b)(3) and (4).

(2) *Effective Changes from Chapter 61 Provisions:* As discussed under the commentary to ORS 65.481, provisions for plans of consolidation have not been included in the Model Act and mergers with foreign corporations are addressed in a separate section. The proposal specifically notes that any conditions to which property of any of the merging corporations was subject shall continue in effect. Although the language of ORS 61.481 is considerably longer and more detailed than that of the proposal, the substance of the two provisions is otherwise the same in all material respects.

(3) *Relationship to the Oregon Business Corporation Act:* The

proposal parallels ORS 60.497, with the exception that the subsection relating to the exchange of shares, which applies only in the business corporation context, has been omitted.

65.497 MERGER WITH FOREIGN CORPORATION

(1) Except as provided in ORS 65.484, one or more foreign business or nonprofit corporations may merge with one or more domestic nonprofit corporations if:

(a) The merger is permitted by the law of the state or country under whose law each foreign business or nonprofit corporation is incorporated and each foreign business or nonprofit corporation complies with that law in effecting the merger;

(b) The foreign business or nonprofit corporation complies with ORS 65.491 if it is the surviving corporation of the merger; and

(c) Each domestic nonprofit corporation complies with the applicable provisions of ORS 65.481 to 65.487 and, if it is the surviving corporation of the merger, with ORS 65.491.

(2) Upon the merger taking effect, a surviving foreign business or nonprofit corporation is deemed to have irrevocably appointed the Secretary of State as its agent for service of process in any proceeding brought against it. [1989 c.1010 § 123]

OFFICIAL COMMENT TO ORS 65.497 (MODEL ACT § 11.06)

(1) *Proposed Changes to the Model Act:* None.

(2) *Effective Changes from Chapter 61 Provisions:* The proposal makes it clear that a merging corporation may be incorporated in another country as well as another state. The designation of the Secretary of State as agent for service of process by a foreign surviving corporation is somewhat broader under the proposal. The proposal does not include a cross-reference to the provisions relating to the transaction of business in this state by foreign corporations. The proposal does not expressly address the issue of the effect of a merger involving a foreign surviving corporation.

(3) *Relationship to the Oregon Business Corporation Act:* The proposal generally parallels ORS 60.501 but does not include provisions contained in ORS 60.501 which are appropriate only in the business corporation context, such as provisions dealing with share exchanges and dissenters' rights.

65.501 EFFECT OF MERGER ON BEQUESTS, DEVISES AND GIFTS

Any bequest, devise, gift, grant or promise contained in a will or other instrument of donation, subscription or conveyance, which is made to a constituent corporation and which takes effect or remains payable after the merger, inures to the surviving corporation unless the will or other instrument otherwise specifically provides. [1989 c.1010 § 124]

OFFICIAL COMMENT TO ORS 65.501 (MODEL ACT § 11.07)

- (1) *Proposed Changes to the Model Act:* None.
- (2) *Effective Changes from Chapter 61 Provisions:* Chapter 61 does not contain a specific provision on the effect of a merger on bequests, devises, and gifts.
- (3) *Relationship to the Oregon Business Corporation Act:* No comparable provision.
- (4) *Other Comments:* This provision derives from California Nonprofit Corporation Law §§ 6022 and 8022.

65.504 MERGER WITH BUSINESS CORPORATION

Any domestic business corporation which is a party to a merger with a nonprofit corporation pursuant to this chapter shall comply with all applicable requirements of the Oregon Business Corporation Act relating to mergers except when inconsistent with this chapter. If a domestic business corporation is the survivor of a merger with a nonprofit corporation, following the merger it shall be subject to the Oregon Business Corporation Act. [1989 c.1010 § 125]

OFFICIAL COMMENT TO ORS 65.504 (MODEL ACT § (NONE))

- (1) *Proposed Changes to the Model Act:* The Model Act does not contain a comparable provision.
- (2) *Effective Changes from Chapter 61 Provisions:* Chapter 61 does not contain a comparable provision.
- (3) *Relationship to the Oregon Business Corporation Act:* No comparable provision.
- (4) *Other Comments:* ORS 65.504 would clarify that a domestic business corporation proposing to merge with a nonprofit corporation must obtain shareholder approval and meet any other

appropriate requirements of Chapter 60. It would also clarify that a surviving corporation which was a domestic business corporation will be subject to the Oregon Business Corporation Act. ORS 60.481 has been amended to cross-reference the chapter on mergers in this Act for mergers between domestic business corporations and nonprofit corporations.

SALE OF ASSETS**65.531 SALE OF ASSETS IN REGULAR COURSE OF ACTIVITIES;
MORTGAGE OF ASSETS**

(1) A corporation may, on the terms and conditions and for the consideration determined by the board of directors:

(a) Sell, lease, exchange or otherwise dispose of all or substantially all of its property in the usual and regular course of its activities; or

(b) Mortgage, pledge, dedicate to the repayment of indebtedness, whether with or without recourse, or otherwise encumber any or all of its property whether or not in the usual and regular course of its activities.

(2) Unless required by the articles of incorporation, approval by the members or any other person of a transaction described in subsection (1) of this section is not required. [1989 c.1010 § 126]

OFFICIAL COMMENT TO ORS 65.531 (MODEL ACT § 12.01)

(1) *Proposed Changes to the Model Act:* Certain changes have been made to conform to the language of the Business Corporation Act where appropriate.

(2) *Effective Changes from Chapter 61 Provisions:* ORS 61.505 requires procedures comparable to those specified in ORS 65.534, Model Act § 12.02, for all sales or other dispositions of all or substantially all the assets of a nonprofit corporation, without exceptions for dispositions in the ordinary course of its activities and for mortgages or other encumbrances of any or all of its property. The proposal will thus expand the authority of the board of directors of a nonprofit corporation, under rare circumstances with respect to sales, but with unlimited discretion (subject to fiduciary obligations under ORS 65.537 and 65.361, Model Act §§ 8.30 and 8.31) with respect to mortgages. If the members of a nonprofit corporation wished to limit the directors' authority to mortgage all or substan-

tially all of its assets, the articles of incorporation could be prepared or amended to include a requirement of approval by members comparable to that specified in ORS 61.505. In the absence of such a provision in the articles, the proposal would permit nonprofit corporations to enter into secured financing transactions substantially in the same manner as business corporations.

(3) *Relationship to the Oregon Business Corporation Act*: This section parallels ORS 60.531.

65.534 SALE OF ASSETS OTHER THAN IN REGULAR COURSE OF ACTIVITIES

(1) A corporation may sell, lease, exchange or otherwise dispose of all or substantially all of its property, with or without the good will, other than in the usual and regular course of its activities, on the terms and conditions and for the consideration determined by the corporation's board of directors if the proposed transaction is authorized by subsection (2) of this section.

(2) Unless this chapter, the articles, bylaws or the board of directors or members, acting pursuant to subsection (4) of this section, require a greater vote or voting by class, the proposed transaction to be authorized must be approved:

(a) By the board;

(b) By the members entitled to vote on the transaction by at least two-thirds of the votes cast or a majority of the voting power, whichever is less; and

(c) In writing by any person or persons whose approval is required for an amendment to the articles or bylaws by a provision of the articles as authorized by ORS 65.467.

(3) If the corporation does not have members entitled to vote on the transaction, it must be approved by a majority of the directors in office at the time the transaction is approved. In addition, the corporation shall provide notice of any directors' meeting at which such approval is to be obtained in accordance with ORS 65.344 (2). The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the sale, lease, exchange or other disposition of all or substantially all of the property of the corporation and contain or be accompanied by a description of the transaction.

(4) The board of directors may condition its submission of the proposed transaction to a vote of members, and the members enti-

led to vote on the transaction may condition their approval of the transaction, on receipt of a higher percentage of affirmative votes or on any other basis.

(5) If the board seeks to have the transaction approved by the members at a membership meeting, the corporation shall give notice to its members of the proposed membership meeting in accordance with ORS 65.214. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the sale, lease, exchange or other disposition of all or substantially all of the property of the corporation and contain or be accompanied by a description of the transaction.

(6) If the board seeks to have the transaction approved by the members by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a description of the transaction.

(7) A public benefit or religious corporation must give written notice to the Attorney General 20 days before it sells, leases, exchanges or otherwise disposes of all or substantially all of its property unless the transaction is in the usual and regular course of its activities or the Attorney General has given the corporation a written waiver of this notice requirement.

(8) After a sale, lease, exchange or other disposition of property is authorized, the transaction may be abandoned, subject to any contractual rights, without further action by the members or any other person who approved the transaction, in accordance with the procedure set forth in the resolution proposing the transaction or, if none is set forth, in the manner determined by the board of directors. [1989 c.1010 § 127]

OFFICIAL COMMENT TO ORS 65.534 (MODEL ACT § 12.02)

(1) *Proposed Changes to the Model Act*: The Model Act has been changed to more closely follow the parallel Business Corporation Act provision, ORS 60.534, and the comparable approval requirements specified in ORS 65.487 as compared with Model Act § 11.03 for mergers. See commentary to ORS 65.487. Certain other changes of a clerical or grammatical nature have also been made.

(2) *Effective Changes from Chapter 61 Provisions*: The Model Act effectively reduces the approval requirement by members to

only a majority of the total votes entitled to be cast where more than 75 percent of such votes are present. The Model Act contemplates that the terms of the transaction will be fixed by the board of directors prior to submission to the members for approval (where required).

(3) *Relationship to the Oregon Business Corporation Act*: The proposal corresponds to ORS 60.534, although the two diverge due to differences in the types of corporations involved.

DISTRIBUTIONS

65.551 PROHIBITED DISTRIBUTIONS

Except as authorized by ORS 65.554, a corporation shall not make any distributions. [1989 c.1010 § 128]

OFFICIAL COMMENT TO ORS 65.551 (MODEL ACT § 13.01)

(1) *Proposed Changes to the Model Act*: None.

(2) *Effective Changes from Chapter 61 Provisions*: Chapter 61 permits all nonprofit corporations to distribute assets to members on dissolution or liquidation. This section, in conjunction with ORS 65.554, Model Act § 13.02, will restrict permitted distributions for public benefit and religious corporations to a greater extent than ORS Chapter 61. The Model Act wording is consistent with the definition of "nonprofit corporation" in ORS 61.011(8).

(3) *Relationship to the Business Corporation Act*: Distributions are authorized by ORS 60.181. The provisions are unrelated, due to the entirely different meaning of "distribution."

65.554 AUTHORIZED DISTRIBUTIONS

Unless prohibited by its articles or bylaws:

(1) A mutual benefit corporation may purchase its memberships and, under the circumstances indicated in ORS 65.147 and 65.171, a public benefit or religious corporation may purchase its memberships, if after the purchase is completed:

(a) The corporation would be able to pay its debts as they become due in the usual course of its activities; and

(b) The corporation's total assets would at least equal the sum of its total liabilities.

(2) A corporation may make distributions upon dissolution in conformity with ORS 65.621 to 65.674.

(3) A corporation may make distributions to a member which is a religious or public benefit corporation or a foreign nonprofit corporation which, if incorporated in this state, would qualify as a religious or public benefit corporation. [1989 c.1010 § 129]

OFFICIAL COMMENT TO ORS 65.554 (MODEL ACT § 13.02)

(1) *Proposed Changes to the Model Act*: Mutual benefit corporations are generally authorized to purchase the membership of a member pursuant to ORS 65.171(2), Model Act § 6.22(b). However, many mutual benefit corporations, such as those exempt from federal income taxation pursuant to Internal Revenue Code section 501(c)(4), will have adopted "noninurement" provisions in articles or bylaws. The added introductory wording relating to articles or bylaws is intended to assure the effectiveness of "noninurement" restraints in organizational documents.

ORS 65.147 and 65.171 depart from Model Act §§ 6.11 and 6.22 in permitting public benefit and religious corporations to purchase membership rights from a member which is also a public benefit or religious corporation. The modifications here are intended to conform to those changes.

(2) *Effective Changes from Chapter 61 Provisions*: Subsection (1) is a new provision. Subsection (2) represents no substantive change from ORS 61.165.

(3) *Relationship to the Oregon Business Corporation Act*: This provision is based in part on ORS 60.181.

DISSOLUTION

(VOLUNTARY DISSOLUTION)

65.621 DISSOLUTION BY INCORPORATORS

(1) A majority of the incorporators of a corporation that has no members and that does not yet have initial directors may, subject to any approval required by the articles or bylaws, dissolve the corporation by delivering articles of dissolution to the Office of the Secretary of State for filing.

(2) The corporation shall give the incorporators notice equivalent to that specified in ORS 65.344 (2), of any meeting at

which dissolution will be considered. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider dissolution of the corporation.

(3) The incorporators in approving dissolution shall adopt a plan of dissolution indicating to whom the assets owned or held by the corporation will be distributed after all creditors have been paid. [1989 c.1010 § 130]

OFFICIAL COMMENT TO ORS 65.621 (MODEL ACT § 14.01)

(1) *Proposed Changes to the Model Act:* As it appears in the Model Act, portions of § 14.01(a) (corresponding to subsection (1) of the proposal) appear to conflict with § 14.02(b) (subsection (2) of the proposal) with regard to corporations which have no members. The proposed modifications are intended to permit expedited dissolution in circumstances where the corporation has not yet completed organization of its affairs. Expedited dissolution is permitted for all corporations that have not yet selected initial directors. A corporation without members may thereafter be dissolved by its directors with the greater procedural safeguards required by ORS 65.624(2), Model Act § 14.02(b), and a corporation with members pursuant to ORS 65.624(1), Model Act § 14.02(a). Those provisions of ORS 65.624, Model Act § 14.02, appeared to duplicate the provisions in Model Act § 14.01 with respect to dissolution by initial directors.

The title of this section has been changed because the Model Act contains no reference to approval by third persons and the revisions of the Task Force deleted references to dissolution by initial directors.

(2) *Effective Changes from Chapter 61 Provisions:* These changes authorize the incorporators to dissolve the corporation and add specific requirements for the content of a notice for a meeting where dissolution will be considered.

(3) *Relationship to the Oregon Business Corporation Act:* This section generally follows ORS 60.621, which permits expedited dissolution for business corporations which have not issued shares or commenced business.

65.624 DISSOLUTION BY DIRECTORS, MEMBERS AND THIRD PERSONS

(1) Unless this chapter, the articles, bylaws or the board of directors or members, acting pursuant to subsection (3) of this section, require a greater vote or voting by class, dissolution is authorized if it is approved:

(a) By the board;

(b) By the members entitled to vote on dissolution, if any, by at least two-thirds of the votes cast or a majority of the voting power, whichever is less; and

(c) In writing, by any person or persons whose approval is required for an amendment of the articles or bylaws, as authorized by ORS 65.467, or for dissolution.

(2) If the corporation does not have members entitled to vote on dissolution, dissolution must be approved by a vote of a majority of the directors in office at the time the transaction is approved. In addition, the corporation shall provide notice of any meeting of the board of directors at which such approval is to be considered in accordance with ORS 65.344 (2). The notice must also state that the purpose, or one of the purposes, of the meeting is to consider dissolution of the corporation and contain or be accompanied by a copy or summary of the plan of dissolution.

(3) The board may condition its submission of the proposed dissolution to a vote of members, and the members may condition their approval of the dissolution on receipt of a higher percentage of affirmative votes or on any other basis.

(4) If the board seeks to have dissolution approved by the members at a membership meeting, the corporation shall give all members, whether or not entitled to vote, notice of the proposed membership meeting in accordance with ORS 65.214. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider dissolving the corporation and contain or be accompanied by a copy or summary of the plan of dissolution.

(5) If the board seeks to have dissolution approved by the members by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the plan of dissolution.

(6) The plan of dissolution shall indicate to whom the assets

owned or held by the corporation will be distributed after all creditors have been paid. [1989 c.1010 § 131; 1991 c.231 § 11]

OFFICIAL COMMENT TO ORS 65.624 (MODEL ACT § 14.02)

(1) *Proposed Changes to the Model Act*: The proposed change in subsection (1)(c) is intended to clarify difficult wording in the Model Act. The intent remains unchanged: if the articles or bylaws require some person other than the directors or members to approve an amendment, then that person must also approve dissolution.

The change in subsection (4) is stylistic.

(2) *Effective Changes from Chapter 61 Provisions*: This section generally follows ORS 61.525. Subsection (3), which permits conditions to be placed on dissolution, has no express counterpart in Chapter 61.

(3) *Relationship to the Oregon Business Corporation Act*: This section parallels ORS 60.627.

(4) *Other Comments*: Either the board of directors or the members may, by the vote of a simple majority, require a supermajority for approval of dissolution. Thus a narrow majority of the directors can thwart the desire of a substantial majority of members. The Task Force felt this provision was appropriate for the protection of the minority. However, there is no similar provision in ORS Chapter 61. By way of comparison, ORS 60.627(3) provides: "The board of directors may condition its submission of the proposal for dissolution on any basis."

65.627 NOTICES TO ATTORNEY GENERAL

(1) A public benefit or religious corporation shall give the Attorney General written notice that it intends to dissolve at or before the time it delivers articles of dissolution to the Secretary of State. The notice shall include a copy or summary of the plan of dissolution.

(2) No assets shall be transferred or conveyed by a public benefit or religious corporation as part of the dissolution process until 20 days after it has given the written notice required by subsection (1) of this section to the Attorney General or until the Attorney General has consented in writing, or indicated in writing, that the Attorney General will take no action in respect to the transfer or conveyance, whichever is earlier.

(3) When all or substantially all of the assets of a public benefit corporation have been transferred or conveyed following approval of dissolution, the board shall deliver to the Attorney General a list showing those, other than creditors, to whom the assets were transferred or conveyed. The list shall indicate the addresses of each person, other than creditors, who received assets and indicate what assets each received. [1989 c.1010 § 132]

OFFICIAL COMMENT TO ORS 65.627 (MODEL ACT § 14.03)

(1) *Proposed Changes to the Model Act*: None.

(2) *Effective Changes from Chapter 61 Provisions*: The requirement of a report to the Attorney General on a voluntary dissolution is new.

(3) *Relationship to the Oregon Business Corporation Act*: The Business Corporation Act contains no comparable provision.

(4) *Other Comments*: Under ORS 128.630 and common law, the Attorney General has general authority for supervision of charitable corporations. Notification to the Attorney General is the only means to alert the appropriate supervising agency of the pending dissolution and should assist the Attorney General in the supervisory function.

65.631 ARTICLES OF DISSOLUTION

(1) At any time after dissolution is authorized, the corporation may dissolve by delivering to the Office of the Secretary of State for filing, articles of dissolution setting forth:

- (a) The name of the corporation;
- (b) The date dissolution was authorized;
- (c) A statement that dissolution was approved by a sufficient vote of the board;
- (d) If approval of members was not required, a statement to that effect and a statement that dissolution was approved by a sufficient vote of the board of directors or incorporators;
- (e) If approval by members entitled to vote was required:
 - (A) The designation and number of members of, and number of votes entitled to be cast by, each class entitled to vote separately on dissolution; and
 - (B) The total number of votes cast for and against dissolution by each class entitled to vote separately on dissolution;

(f) If approval of dissolution by some person or persons other than the members entitled to vote on dissolution, the board or the incorporators is required pursuant to ORS 65.624 (1)(c), a statement that the approval was obtained; and

(g) If the corporation is a public benefit or religious corporation, that the notice to the Attorney General required by ORS 65.627 (1) has been given.

(2) A corporation is dissolved upon the effective date of its articles of dissolution. [1989 c.1010 § 133]

OFFICIAL COMMENT TO ORS 65.631 (MODEL ACT § 14.04)

(1) *Proposed Changes to the Model Act:* The changes in Subsection (1)(e)(A) are generally intended to conform this section to ORS 65.447 and 65.491 as compared with Model Act §§ 10.05 and 11.04. Deletion of "indisputably" is based on the Task Force's belief that a corporate officer will certify to the Secretary of State the authenticity of information reported in the articles of dissolution. Presumably the corporate officer will not certify votes he or she believes to be "disputable" so nothing is gained by requiring separate reporting of votes which are "indisputable." Deletion of the reference to "undisputed" votes in subsection (1)(e)(B) was based on the same reasoning.

(2) *Effective Changes from Chapter 61 Provisions:* The Model Act is intended to give a corporation flexibility to file its articles of dissolution either at the time dissolution is authorized or after it has wound up its affairs and disposed of its assets, or anytime in between. Under existing Oregon law (ORS 61.545) a nonprofit corporation may not file articles of dissolution until it has completely wound up its affairs and disposed of its property. For a business corporation, however, current Oregon law (ORS 60.631) grants the same flexibility provided by the Model Act. The Model Act is chosen over existing law in the interests of consistency with Chapter 60.

(3) *Relationship to the Oregon Business Corporation Act:* This section generally follows ORS 60.631.

65.634 REVOCATION OF DISSOLUTION

(1) A corporation may revoke its dissolution within 120 days of its effective date.

(2) Revocation of dissolution must be authorized in the same

manner as the dissolution was authorized unless that authorization of dissolution permits revocation by action of the board of directors alone. If the authorization of dissolution permits revocation by action of the board of directors alone, the board of directors may revoke the dissolution without action by the members or any other person.

(3) After the revocation of dissolution is authorized, the corporation may revoke the dissolution by delivering to the Office of Secretary of State for filing, articles of revocation of dissolution that set forth:

(a) The name of the corporation;

(b) The effective date of the dissolution that was revoked;

(c) The date that the revocation of dissolution was authorized;

(d) If the corporation's board of directors or incorporators revoked the dissolution, a statement to that effect;

(e) If the corporation's board of directors revoked a dissolution authorized by the members alone or in conjunction with another person or persons, a statement that revocation was permitted by action by the board of directors alone pursuant to that authorization; and

(f) If member or third-person action was required to revoke the dissolution, the information required by ORS 65.631 (1)(e) and (f).

(4) Unless a delayed effective date is specified, revocation of dissolution is effective when articles of revocation of dissolution are filed.

(5) When the revocation of dissolution is effective, it relates back to and takes effect as of the effective date of the dissolution and the corporation resumes carrying on its activities as if dissolution had never occurred. [1989 c.1010 § 134]

OFFICIAL COMMENT TO ORS 65.634 (MODEL ACT § 14.05)

(1) *Proposed Changes to the Model Act:* The changes in subsection (2) are stylistic and follow ORS 60.634. The change in subsection (4), permitting revocation with a delayed effective date, is substantive but also follows ORS 60.634. It is accepted for reasons of consistency.

(2) *Effective Changes from Chapter 61 Provisions:* Under existing Oregon law (ORS 61.540) the dissolution of a nonprofit corporation may be revoked before but not after the articles of

dissolution have been issued. For business corporations, Oregon law (ORS 60.634) follows the Model Act approach of permitting revocation up to 120 days after the effective date of dissolution. The Model Act is adopted here for consistency with the Business Corporation Act.

(3) *Relationship to the Oregon Business Corporation Act*: This section generally follows ORS 60.634.

65.637 EFFECT OF DISSOLUTION

(1) A dissolved corporation continues its corporate existence but may not carry on any activities except those appropriate to wind up and liquidate its affairs, including:

(a) Preserving and protecting its assets and minimizing its liabilities;

(b) Discharging or making provision for discharging its liabilities and obligations;

(c) Disposing of its properties that will not be distributed in kind;

(d) Returning, transferring or conveying assets held by the corporation upon a condition requiring return, transfer or conveyance, which condition occurs by reason of the dissolution, in accordance with such condition;

(e) Transferring, subject to any contractual or legal requirements, its assets as provided in or authorized by its articles of incorporation or bylaws;

(f) If the corporation is a public benefit or religious corporation, and no provision has been made in its articles or bylaws for distribution of assets on dissolution, transferring, subject to any contractual or legal requirement, its assets to one or more persons described in ORS 65.001 (31)(b);

(g) If the corporation is a mutual benefit corporation and no provision has been made in its articles or bylaws for distribution of assets on dissolution, transferring, subject to any contractual or legal requirements, its assets to its members or, if it has no members, to those persons whom the corporation holds itself out as benefiting or serving; and

(h) Doing every other act necessary to liquidate its assets and wind up its affairs.

(2) Dissolution of a corporation does not:

(a) Transfer title to the corporation's property;

(b) Subject its directors or officers to standards of conduct different from those prescribed in ORS 65.301 to 65.414;

(c) Change quorum or voting requirements for its board or members, change provisions for selection, resignation or removal of its directors or officers, or both, or change provisions for amending its bylaws;

(d) Prevent commencement of a proceeding by or against the corporation in its corporate name;

(e) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; or

(f) Terminate the authority of the registered agent of the corporation. [1989 c.1010 § 135]

OFFICIAL COMMENT TO ORS 65.637 (MODEL ACT § 14.06)

(1) *Proposed Changes to the Model Act*: In subsection (1)(f), references to § 501(c)(3) of the Internal Revenue Code are replaced with a cross-reference to the required dissolution clause in the proposed Act's definition of public benefit corporation. The drafters of the Model Act have generally substituted the word "activities" where the word "business" appears in the Model Business Corporation Act. In subsection (a)(8), corresponding to subsection (1)(h) of the proposal, they inexplicably used the word "assets" instead. The suggested change is in the interest of consistency. The change at the end of subsection (2)(f) generally follows the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions*: Existing Oregon law merely cross-references the provisions of the Business Corporation Act, ORS 60.637. Additional requirements are found in ORS 61.525(2). The proposed wording assists clarity, but is not substantively different in any major respect.

(3) *Relationship to the Oregon Business Corporation Act*: Existing Oregon business corporation law on this subject (ORS 60.637) generally parallels the Model Act except, of course, as to the interest of members.

65.641 KNOWN CLAIMS AGAINST DISSOLVED CORPORATION

(1) A corporation electing to dispose of known claims pursuant to this section shall notify its known claimants in writing of the

dissolution at any time after its effective date. The written notice must:

- (a) Describe information that must be included in a claim;
 - (b) Provide a mailing address where a claim may be sent;
 - (c) State the deadline, which may not be fewer than 120 days from the effective date of the written notice, by which the dissolved corporation must receive the claim; and
 - (d) State that the claim will be barred if not received by the deadline.
- (2) A claim against the dissolved corporation is barred:
- (a) If a claimant who was given written notice under subsection (1) of this section does not deliver the claim to the dissolved corporation by the deadline; and
 - (b) If a claimant whose claim was rejected by the dissolved corporation does not commence a proceeding to enforce the claim within 90 days from the effective date of the rejection notice.
- (3) For purposes of this section, "claim" does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution. [1989 c.1010 § 136]

OFFICIAL COMMENT TO ORS 65.641 (MODEL ACT § 14.07)

(1) *Proposed Changes to the Model Act:* Subsection (a) of the Model Act is deleted as being redundant and surplusage. It is permissive rather than mandatory and simply spells out the legal effect of the statute which is adequately described in the operative sections. The mere inclusion of this process in the statute should resolve any concerns regarding the power of a dissolved corporation to avail itself of this process.

The change in subsection (1) (subsection (b) of the Model Act) is intended to avoid any implication that the procedures of this section are exclusive of other means to the same end.

(2) *Effective Changes from Chapter 61 Provisions:* Existing Oregon law (ORS 61.525(2)) requires a nonprofit corporation to warn its creditors as soon as it makes the decision to dissolve.

(3) *Relationship to the Oregon Business Corporation Act:* The parallel section of the Business Corporation Act (ORS 60.641(2)) follows the Model Act in giving the dissolving corporation complete discretion as to the timing of its notice to creditors.

65.644 UNKNOWN CLAIMS AGAINST DISSOLVED CORPORATION

(1) A dissolved corporation may publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice.

(2) The notice must:

(a) Be published at least one time in a newspaper of general circulation in the county where the dissolved corporation's principal office is located, or if the principal office is not in this state, where its registered office is or was last located;

(b) Describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and

(c) State that a claim against the corporation will be barred unless a proceeding to enforce the claim is commenced within five years after publication of the notice.

(3) If the dissolved corporation publishes a newspaper notice in accordance with subsection (2) of this section, the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within five years after the publication date of the newspaper notice:

(a) A claimant who did not receive written notice under ORS 65.641;

(b) A claimant whose claim was sent in a timely manner to the dissolved corporation but not acted on; or

(c) A claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

(4) A claim may be enforced under this section:

(a) Against the dissolved corporation, to the extent of its undistributed assets; or

(b) Against any person, other than a creditor of the corporation, to whom the corporation distributed its property in liquidation subject to the following:

(A) If the distributee received a pro rata share of a distribution, the distributee's liability will not exceed the same pro rata share of the claim; and

(B) The distributee's total liability for all claims under this section may not exceed the total amount of assets distributed to the distributee, less any liability of the corporation paid on behalf of

the corporation by that distributee after the date of distribution. [1989 c.1010 § 137]

OFFICIAL COMMENT TO ORS 65.644 (MODEL ACT § 14.08)

(1) *Proposed Changes to the Model Act*: Deletion of the word “also” in subsection (1) is stylistic and is intended to assure that this section is available to corporations not using ORS 65.641, Model Act § 14.07. The proposed changes in subsections (2) and (3) are also stylistic, but parallel the language of ORS 60.644.

The proposed changes in subsection (4) are in the interest of clarity. Drafters of the Model Act attempted to parallel the Model Business Corporation Act changing “stockholder” references to “member” references. The final change incorporates the same setoff provided in the Business Corporation Act.

(2) *Effective Changes from Chapter 61 Provisions*: There is no similar notification by publication statute in current Oregon law with regard to nonprofit corporations.

(3) *Relationship to the Oregon Business Corporation Act*: ORS 60.644 generally follows the Model Act’s language as to business corporations.

(ADMINISTRATIVE DISSOLUTION)

65.647 GROUNDS FOR ADMINISTRATIVE DISSOLUTION

The Secretary of State may commence a proceeding under ORS 65.651 to administratively dissolve a corporation if:

- (1) The corporation does not pay when due any fees imposed by this chapter;
- (2) The corporation does not deliver its annual report to the Secretary of State when due;
- (3) The corporation is without a registered agent or registered office in this state;
- (4) The corporation does not notify the Secretary of State that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued; or
- (5) The corporation’s period of duration, if any, stated in its articles of incorporation expires. [1989 c.1010 § 138]

OFFICIAL COMMENT TO ORS 65.647 (MODEL ACT § 14.20)

(1) *Proposed Changes to the Model Act*: The proposed changes, removing the waiting periods and giving the Secretary of State discretion (by cross-reference) to commence dissolution proceedings immediately upon discovering a violation, parallel the changes made in the adoption of ORS 60.647.

(2) *Effective Changes from Chapter 61 Provisions*: The relevant section of the existing Oregon Nonprofit Corporation Law (ORS 61.556) simply adopts the corresponding sections of the Business Corporation Act (ORS 60.647 to 60.657) by explicit cross-reference.

(3) *Relationship to the Oregon Business Corporation Act*: ORS 60.647 is generally parallel.

65.651 PROCEDURE FOR AND EFFECT OF ADMINISTRATIVE DISSOLUTION

(1) If the Secretary of State determines that one or more grounds exist under ORS 65.647 for dissolving a corporation, the Secretary of State shall give the corporation written notice of that determination.

(2) If the corporation does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the Secretary of State, within 45 days after notice is given that each ground determined by the Secretary of State does not exist, the Secretary of State shall administratively dissolve the corporation and give the corporation notice of the dissolution, and in the case of a public benefit corporation shall notify the Attorney General in writing.

(3) A corporation administratively dissolved continues its corporate existence but may not carry on any activities except those necessary to wind up and liquidate its affairs under ORS 65.637 and notify its claimants under ORS 65.641 and 65.644.

(4) The administrative dissolution of a corporation does not terminate the authority of its registered agent. [1989 c.1010 § 139]

OFFICIAL COMMENT TO ORS 65.651 (MODEL ACT § 14.21)

(1) *Proposed Changes to the Model Act*: The proposed changes reflect the language of ORS 60.651, and thus carry forward existing law. The requirement of notice to the Secretary of State is dropped from subsection (1), since such a notice is furnished under subsection (2).

(2) *Effective Changes from Chapter 61 Provisions*: The current Oregon Nonprofit Corporation Law adopts the relevant section of the Business Corporation Act by cross-reference. This section does not represent a substantive change.

(3) *Relationship to the Oregon Business Corporation Act*: ORS 60.651 is generally parallel.

65.654 REINSTATEMENT FOLLOWING ADMINISTRATIVE DISSOLUTION

(1) A corporation administratively dissolved under ORS 65.651 may apply to the Secretary of State for reinstatement. The application must:

(a) State the name of the corporation and the effective date of its administrative dissolution; and

(b) State that the ground or grounds for dissolution either did not exist or have been eliminated.

(2) If the Secretary of State determines that the application contains the information required by subsection (1) of this section, that the information is correct, and that the corporation's name satisfies the requirements of ORS 65.094, the Secretary of State shall reinstate the corporation.

(3) When reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its activities as if the administrative dissolution had never occurred. [1989 c.1010 § 140]

OFFICIAL COMMENT TO ORS 65.654 (MODEL ACT § 14.22)

(1) *Proposed Changes to the Model Act*: The changes are generally consistent with ORS 60.654. Deletion of the two-year limitation, provisions dealing with the corporate name, and wording changes merely follow Oregon's modifications to the Model Business Corporation Act. The Model Act's provisions relating to a certificate of tax authorities was deemed by the Task Force to be at least cumbersome and potentially impossible to comply with in the absence of companion legislation requiring tax authorities to provide such certificates.

(2) *Effective Changes from Chapter 61 Provisions*: Because existing law cross-references ORS 60.654, this section does not represent a substantive change.

(3) *Relationship to the Oregon Business Corporation Act*: The Model Act language is nearly parallel to ORS 60.654 which currently applies to both business and nonprofit corporations.

(4) *Other Comments*: The deletion of the Model Nonprofit Corporation Act (3)(a) parallels Oregon's departure from the analogous provisions of the Model Business Corporation Act. The drafters of the Model Act apparently expected each state to insert the names of the state's tax collector. Since, in Oregon, taxes may be owed to the State, to counties, and to a myriad of special taxing districts, inserting the name of a single taxing authority seemed inappropriate. Furthermore, the availability of compliance certificates was not clear. Accordingly, the provision was deleted.

65.657 APPEAL FROM DENIAL OF REINSTATEMENT

(1) If the Secretary of State denies a corporation's application for reinstatement following administrative dissolution, the Secretary of State shall give written notice to the corporation that explains the reason or reasons for denial.

(2) Such denial of reinstatement shall be reviewable pursuant to ORS 183.484 and shall not constitute a contested case order. [1989 c.1010 § 141]

OFFICIAL COMMENT TO ORS 65.657 (MODEL ACT § 14.23)

(1) *Proposed Changes to the Model Act*: The proposed changes made this section generally parallel ORS 60.657. As previously noted, the Oregon Nonprofit Corporation Law (ORS 61.556) has adopted that statute by reference. Thus the change reflects existing law.

(2) *Effective Changes from Chapter 61 Provisions*: No substantive change.

(3) *Relationship to the Oregon Business Corporation Act*: ORS 60.657 is parallel, except that the Task Force specified that appeals would be pursuant to ORS 183.484 and would not constitute a contested case order. A parallel specification is in ORS 65.744.

The Business Corporation Act makes the appeal of a denied reinstatement subject to the Oregon Administrative Procedures Act. This avoids the necessity discussed in the commentary to the Model Act of dealing with burden of proof and standards of review. ORS Chapter 60 leaves some ambiguity, in that it is not clear whether

denial of a petition for reinstatement is a completed administrative action which may be appealed to the Court of Appeals or is to be heard by the Secretary of State as a contested case. The commentary on ORS Chapter 60 does not address this issue. See further discussion in the commentary to ORS 65.744.

(JUDICIAL DISSOLUTION)

65.661 GROUNDS FOR JUDICIAL DISSOLUTION

(1) The circuit courts may dissolve a corporation:

(a) In a proceeding by the Attorney General if it is established that:

(A) The corporation obtained its articles of incorporation through fraud;

(B) The corporation has exceeded or abused the authority conferred upon it by law;

(C) The corporation has fraudulently solicited money or has fraudulently used the money solicited;

(D) The corporation is a public benefit corporation and the corporate assets are being misapplied or wasted; or

(E) The corporation is a public benefit corporation and is no longer able to carry out its purposes;

(b) Except as provided in the articles or bylaws of a religious corporation, in a proceeding by 50 members or members holding five percent or more of the voting power, whichever is less, or by a director or any person specified in the articles, if it is established that:

(A) The directors are deadlocked in the management of the corporate affairs, and the members, if any, are unable to break the deadlock;

(B) The directors or those in control of the corporation have acted, are acting or will act in a manner that is illegal, oppressive of [sic] fraudulent;

(C) The members are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired;

(D) The corporate assets are being misapplied or wasted; or

(E) The corporation is a public benefit or religious corporation and is no longer able to carry out its purposes;

(c) In a proceeding by a creditor if it is established that:

(A) The creditor's claim has been reduced to judgment, the execution on the judgment has been returned unsatisfied and the corporation is insolvent; or

(B) The corporation has admitted in writing that the creditor's claim is due and owing and the corporation is insolvent; or

(d) In a proceeding by the corporation to have its voluntary dissolution continued under court supervision.

(2) Prior to dissolving a corporation, the court shall consider whether:

(a) There are reasonable alternatives to dissolution;

(b) Dissolution is in the public interest, if the corporation is a public benefit corporation; or

(c) Dissolution is the best way of protecting the interests of members, if the corporation is a mutual benefit corporation. [1989 c.1010 § 142]

OFFICIAL COMMENT TO ORS 65.661 (MODEL ACT § 14.30)

(1) *Proposed Changes to the Model Act*: The Task Force modifications generally follow existing Oregon law.

(2) *Effective Changes from Chapter 61 Provisions*: The section is not inconsistent with ORS 61.565. An additional ground for judicial dissolution appears in ORS 61.556, probably the miscodification of a legislative enactment. The provision is incorporated as subsection (1)(a)(C). Other changes in subsection (1) are consistent with ORS 60.661.

(3) *Relationship to the Oregon Business Corporation Act*: Subsection (a) of this section generally follows ORS 60.661.

65.664 PROCEDURE FOR JUDICIAL DISSOLUTION

(1) Venue for a proceeding by the Attorney General to dissolve a corporation lies in Marion County. Venue for a proceeding brought by any other party named in ORS 65.661 lies in the county where a corporation's principal office is located or, if the principal office is not in this state, where its registered office is or was last located.

(2) It is not necessary to make directors or members parties to a

proceeding to dissolve a corporation unless relief is sought against them individually.

(3) A court in a proceeding brought to dissolve a corporation may issue injunctions, appoint a receiver or custodian pendente lite with all powers and duties the court directs, take other action required to preserve the corporate assets wherever located, and carry on the activities of the corporation until a full hearing can be held.

(4) A person other than the Attorney General who brings an involuntary dissolution proceeding for a public benefit or religious corporation shall forthwith give written notice of the proceeding to the Attorney General who may intervene. [1989 c.1010 § 143]

OFFICIAL COMMENT TO ORS 65.664 (MODEL ACT § 14.31)

(1) *Proposed Changes to the Model Act:* The proposed changes are stylistic and follow and parallel wording of ORS 60.664.

(2) *Effective Changes from Chapter 61 Provisions:* Although the wording is different, the substance of this section is generally the same as ORS 61.565. Subsection (4), however, is new.

(3) *Relationship to the Oregon Business Corporation Act:* The Model Act language parallels ORS 60.664, but is consistent with ORS 61.565.

65.667 RECEIVERSHIP OR CUSTODIANSHIP

(1) A court in a judicial proceeding brought to dissolve a public benefit or mutual benefit corporation may appoint one or more receivers to wind up and liquidate the affairs of the corporation, or one or more custodians to manage the affairs of the corporation. The court shall hold a hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian. The court appointing a receiver or custodian has exclusive jurisdiction over the corporation and all its property wherever located.

(2) The court may appoint an individual or a domestic or foreign business or nonprofit corporation, authorized to transact business in this state, as a receiver or custodian. The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs.

(3) The court shall describe the powers and duties of the receiver

or custodian in its appointing order, which may be amended periodically. Among other powers:

(a) The receiver:

(A) May dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court, provided, however, that the receiver's power to dispose of the assets of the corporation is subject to any trust and other restrictions that would be applicable to the corporation; and

(B) May sue and defend in the receiver's own name as receiver of the corporation in all courts of this state.

(b) The custodian may exercise all of the powers of the corporation, through or in place of its board of directors or officers, to the extent necessary to manage the affairs of the corporation in the best interests of its members and creditors.

(4) The court during a receivership may redesignate the receiver a custodian, and during a custodianship may redesignate the custodian a receiver, if doing so is in the best interest of the corporation, its members and creditors.

(5) The court periodically during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and the receiver's or custodian's attorney from the assets of the corporation or proceeds from the sale of the assets. [1989 c.1010 § 144]

OFFICIAL COMMENT TO ORS 65.667 (MODEL ACT § 14.32)

(1) *Proposed Changes to the Model Act:* The proposed changes match ORS 60.667, and thus continue existing law.

(2) *Effective Changes from Chapter 61 Provisions:* The language of the Model Act parallels ORS 60.667, but is consistent with ORS 61.565(4). The Oregon Nonprofit Corporation Law (ORS 61.568) expressly adopts ORS 60.667 by reference.

(3) *Relationship to the Oregon Business Corporation Act:* This section follows ORS 60.667.

65.671 DECREE OF DISSOLUTION

(1) If after a hearing the court determines that one or more grounds for judicial dissolution described in ORS 65.661 exist, it may enter a decree dissolving the corporation and specifying the effective date of the dissolution. The clerk of the court shall deliver

a certified copy of the decree to the Office of the Secretary of State for filing.

(2) After entering the decree of dissolution, the court shall direct the winding up and liquidation of the corporation's affairs in accordance with ORS 65.637 and the notification of claimants in accordance with ORS 65.641 and 65.644. [1989 c.1010 § 145]

OFFICIAL COMMENT TO ORS 65.671 (MODEL ACT § 14.33)

(1) *Proposed Changes to the Model Act*: The proposed changes reflect the language of ORS 60.671.

(2) *Effective Changes from Chapter 61 Provisions*: The Model Act language parallels that of ORS 60.671, which is adopted by specific reference in ORS 61.591.

(3) *Relationship to the Oregon Business Corporation Act*: This section follows ORS 60.671.

(DISPOSITION OF ASSETS)

65.674 DEPOSIT WITH DIVISION OF STATE LANDS

Assets of a dissolved corporation which should be transferred to a creditor, claimant or member of the corporation who cannot be found or who is not competent to receive them shall be reduced to cash unless they are subject to known trust restrictions and deposited with the Division of State Lands for safekeeping. However, in the discretion of the Director of the Division of State Lands, property of unusual historic or aesthetic interest may be received and held in kind. The receiver or other liquidating agent shall prepare in duplicate and under oath a statement containing the names and last-known addresses of the persons entitled to such funds. One of the statements shall be filed with the Division of State Lands and another shall be delivered to the Secretary of State for filing. The funds shall then escheat to and become the property of the State of Oregon and shall become part of the Common School Fund of the state. The owner, heirs or personal representatives of the owner, may reclaim any funds so deposited in the manner provided for estates which have escheated to the state. [1989 c.1010 § 146]

OFFICIAL COMMENT TO ORS 65.674 (MODEL ACT § 14.40)

(1) *Proposed Changes to the Model Act*: The proposed changes to the Model Act language carry forward existing Oregon law.

(2) *Effective Changes from Chapter 61 Provisions*: ORS 61.595 cross-referenced ORS 60.674.

(3) *Relationship to the Oregon Business Corporation Act*: The adapters of the Model Business Corporation Act inserted in ORS 60.674 a specific escheat provision. The statute was referenced in ORS 61.595.

FOREIGN CORPORATIONS

(AUTHORITY TO TRANSACT BUSINESS)

65.701 AUTHORITY TO TRANSACT BUSINESS REQUIRED

(1) A foreign corporation may not transact business in this state until it has been authorized to do so by the Secretary of State.

(2) The following activities, among others, do not constitute transacting business within the meaning of subsection (1) of this section:

(a) Maintaining, defending or settling any proceeding.

(b) Holding meetings of the board of directors or members or carrying on other activities concerning internal corporate affairs.

(c) Maintaining bank accounts.

(d) Maintaining offices or agencies for the transfer, exchange and registration of the corporation's own memberships or securities or maintaining trustees or depositaries with respect to those securities.

(e) Selling through independent contractors.

(f) Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this state before they become contracts.

(g) Creating or acquiring indebtedness, mortgages and security interests in real or personal property.

(h) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts.

(i) Owning, without more, real or personal property.

(j) Conducting an isolated transaction that is completed within 30 days and that is not one in the course of repeated transactions of a like nature.

(k) Transacting business in interstate commerce.

(L) Soliciting funds.

(3) The list of activities in subsection (2) of this section is not exhaustive. [1989 c.1010 § 147]

OFFICIAL COMMENT TO ORS 65.701 (MODEL ACT § 15.01)

(1) *Proposed Changes to the Model Act*: Subsection (2)(d) is revised to clarify the contemplated activity.

Subsection (2)(L) is added since soliciting funds has been a part of the list of activities that do not constitute "transacting business" in Oregon since the Oregon Nonprofit Corporation Law was enacted in 1959. Because solicitation of funds is an important activity of many nonprofit corporations, its retention on the list is recommended.

(2) *Effective Changes from Chapter 61 Provisions*: The last sentence of ORS 61.655(1) provides that a foreign corporation shall not be denied authority to transact business in Oregon merely because the laws of the state or country where the corporation is organized differ from Oregon's laws and that nothing in ORS Chapter 61 shall be construed as authorizing Oregon to regulate the internal affairs of foreign corporations. The first clause of that sentence has been added as a new subsection (3) to ORS 65.707(3). The last clause of the sentence was placed in Model Act § 15.05(c), ORS 65.714(3), by the Model Act drafters. Both moves place existing law in what appears to be more appropriate sections.

(3) *Relationship to the Oregon Business Corporation Act*: Closely parallels ORS 60.701.

65.704 CONSEQUENCES OF TRANSACTING BUSINESS WITHOUT AUTHORITY

(1) A foreign corporation transacting business in this state without authorization from the Secretary of State may not maintain a proceeding in any court in this state until it obtains authorization from the Secretary of State to transact business in this state.

(2) The successor to or assignee of a foreign corporation that transacted business in this state without authority to do so may not maintain a proceeding on its cause of action in any court in this state until the foreign corporation or its successor obtains authorization from the Secretary of State to transact business in this state.

(3) A court may stay a proceeding commenced by a foreign corporation, its successor or assignee until it determines whether the

foreign corporation or its successor requires authorization from the Secretary of State to transact business in this state. If it so determines, the court may further stay the proceeding until the foreign corporation or its successor obtains the authorization.

(4) A foreign corporation that transacts business in this state without authority shall be liable to this state for the years or parts thereof during which it transacted business in this state without authority in an amount equal to all fees that would have been imposed by this chapter upon such corporation had it duly applied for and received authority to transact business in this state as required by this chapter and thereafter filed all reports required by this chapter.

(5) Notwithstanding subsections (1) and (2) of this section, the failure of a foreign corporation to obtain authority to transact business in this state does not impair the validity of its corporate acts or prevent it from defending any proceeding in this state. [1989 c.1010 § 148]

OFFICIAL COMMENT TO ORS 65.704 (MODEL ACT § 15.02)

(1) *Proposed Changes to the Model Act*: The "certificate of authority" terminology is replaced by the existing, broader language of the current statute. The words "or assignee of" are inserted in subsection (2) to clarify the rule that a foreign corporation may not sue on a claim it has until it is qualified to do business in Oregon. The same rule applies to the assignee of a claim held by a foreign corporation. Section 15.02(d) of the Model Act contemplates a civil per diem penalty for a nonprofit corporation that transacts business without authority. The Oregon Business Corporation Act imposes a fee recapture provision, and a like provision is suggested in the case of nonprofit foreign corporations as well.

(2) *Effective Changes from Chapter 61 Provisions*: A fee recapture provision is added where none existed before. Though probably implicit in ORS 61.745(1), the Model Act makes explicit the court's power to stay a proceeding commenced by a foreign corporation or its successor or assignee until it determines whether the corporation has authority to transact business. Otherwise, the Model Act does not alter the substance of ORS 61.745 but merely breaks up the cumbersome subsection (1) into three logical and discrete smaller parts.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal closely parallels ORS 60.704.

(4) *Other Comments*: In avoiding the term “certificate of authority,” the drafters of ORS 60.704 introduced a redundancy throughout this section. For example, subsections (2) and (4) each contain the term “transact business in this state” (or a close variation) three times. By editing to eliminate the redundancy (*compare* ORS 60.704(2) *with* subsection (2)), provisions in the two Acts that are substantively identical are worded differently.

65.707 APPLICATION FOR AUTHORITY TO TRANSACT BUSINESS

(1) A foreign corporation may apply for authority to transact business in this state by delivering an application to the Office of the Secretary of State for filing. The application must set forth:

(a) The name of the foreign corporation or, if its name is unavailable for use in this state, a corporate name that satisfies the requirements of ORS 65.717;

(b) The name of the state or country under whose law it is incorporated;

(c) The date of incorporation and period of duration if not perpetual;

(d) The address including street and number and mailing address, of its principal office;

(e) The address, including street and number, of its registered office in this state and the name of its registered agent at that office;

(f) The names and respective addresses of the president and secretary of the foreign corporation;

(g) Whether the foreign corporation has members; and

(h) Whether the corporation, if it had been incorporated in this state, would be a public benefit, mutual benefit or religious corporation.

(2) The foreign corporation shall deliver with the completed application a certificate of existence or a document of similar import, current within 60 days of delivery and authenticated by the official having custody of corporate records in the state or country under whose law it is incorporated.

(3) A foreign corporation shall not be denied authority to transact business in this state by reason of the fact that the laws of the state or country under which the corporation is organized governing

its organization and internal affairs differ from the laws of this state. [1989 c.1010 § 149]

OFFICIAL COMMENT TO ORS 65.707 (MODEL ACT § 15.03)

(1) *Proposed Changes to the Model Act*: The Model Act requires the names and address of the current officers and directors to be set forth in the application. The existing law requires only the names and addresses of the president and the secretary. The latter rule is retained. Subsection (3) is added to preserve the existing law contained in the first clause of the last sentence in ORS 61.655(1). Otherwise, the changes are minor and clarify Model Act language without altering substance.

(2) *Effective Changes from Chapter 61 Provisions*: Subsections (1)(g) and (h) are new. Subsection (3) is from ORS 61.655(1). Otherwise, the existing provision is unchanged.

(3) *Relationship to the Oregon Business Corporation Act*: Virtually identical to ORS 60.707 except for the addition of (1)(g) and (h) and (3).

65.711 AMENDMENT TO APPLICATION FOR AUTHORITY

(1) A foreign corporation authorized to transact business in this state shall deliver an amendment to the application for authority to transact business in this state to the Office of the Secretary of State for filing if it changes:

(a) Its corporate name as shown on the records of the office; or
(b) The period of its duration.

(2) The amendment to the application for authority to transact business in this state shall set forth the corporate name shown on the records of the office and the new corporate name or the new period of duration. The corporate name as changed must satisfy the requirements of ORS 65.717. [1989 c.1010 § 150]

OFFICIAL COMMENT TO ORS 65.711 (MODEL ACT § 15.04)

(1) *Proposed Changes to the Model Act*: The proposed changes bring this provision in line with its parallel counterpart in ORS Chapter 60. The provision describes a ministerial procedure and the changes reflect that procedure as it is followed in Oregon.

(2) *Effective Changes from Chapter 61 Provisions*: None.

(3) *Relationship to the Oregon Business Corporation Act*: Substantially identical to ORS 60.711.

65.714 EFFECT OF AUTHORITY

(1) A foreign corporation authorized to transact business in this state has the same but no greater rights and enjoys the same but no greater privileges as, and except as otherwise provided by this chapter is subject to the same duties, restrictions, penalties and liabilities now or later imposed on a domestic corporation of like character.

(2) The filing by the Secretary of State of an application or amendment to the application for authority to transact business shall constitute authorization to transact business in this state, subject to the right of the Secretary of State to revoke the authorization.

(3) This chapter does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state. [1989 c.1010 § 151]

OFFICIAL COMMENT TO ORS 65.714 (MODEL ACT § 15.05)

(1) *Proposed Changes to the Model Act*: Subsection (2) provides that the filing by the office of the Secretary of State of an application or amendment to the application for authority to transact business constitutes authorization to transact business. Otherwise, the changes are made for clarification and not to alter substance.

(2) *Effective Changes from Chapter 61 Provisions*: None.

(3) *Relationship to the Oregon Business Corporation Act*: Identical to ORS 60.714.

(4) *Other Comments*: The Task Force faced the dilemma of employing the language of ORS Chapter 60 or using different language for a substantively identical provision. Whether the phrase "the same but no greater rights," ORS 60.714(1), is more precise than "the same rights," Model Act § 15.05(a), is debatable. In the interest of uniformity, the Task Force resisted the temptation to edit Chapter 60.

65.717 CORPORATE NAME OF FOREIGN CORPORATION

(1) Except as provided in subsection (2) of this section, the Secretary of State shall not authorize a foreign corporation to transact

business in this state unless the corporate name of the corporation satisfies the requirements of ORS 65.094.

(2) If a corporate name, professional corporate name, business corporate name, cooperative name, limited partnership name, business trust name, reserved name, registered corporate name or assumed business name of active record with the office is not distinguishable on the records of the office from the corporate name of the applicant foreign corporation, the Secretary of State shall not authorize the applicant to transact business in this state unless the foreign corporation states the corporate name on the application for authority to transact business in this state under ORS 65.707 as "(name under which incorporated), a corporation of (place of incorporation)," the entirety of which shall be the real and true name of the corporation under ORS chapter 648.

(3) If a foreign corporation authorized to transact business in this state changes its corporate name to one that does not satisfy the requirements of ORS 65.094, it shall not transact business in this state under the changed name until it adopts a name satisfying the requirements of ORS 65.094 and delivers to the Office of the Secretary of State for filing an amendment to the application for authority under ORS 65.711. [1989 c.1010 § 152]

OFFICIAL COMMENT TO ORS 65.717 (MODEL ACT § 15.06)

(1) *Proposed Changes to the Model Act*: The principal changes are a result of changes made by ORS 65.094 by comparison with Model Act § 4.01. Model Act § 15.06(a) is more concisely stated in ORS 65.094, hence the proposal references ORS 65.094 without restating it. Proposed subsection (1) thus parallels ORS 60.717(1), its corresponding provision.

The provisions of subsection (b) of the Model Act are replaced by language identical to that in ORS 60.717(3). The revised provision specifies other entities, such as limited partnerships, cooperatives, and business trusts, whose names must remain distinguishable from the applicant foreign corporation.

Model Act § 15.06(c)(2) appears at ORS 65.094(5) instead of here.

Subsection (d) of the Model Act is deleted as an unnecessary statement of existing law.

In subsection (3), corresponding to subsection (e) of the Model

Act, the changes merely reflect the change in terminology from "certificate of authority" to "application for authority."

(2) *Effective Changes from Chapter 61 Provisions*: There is no effective change.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal corresponds to ORS 60.717.

65.721 REGISTERED OFFICE AND REGISTERED AGENT OF FOREIGN CORPORATION

Each foreign corporation authorized to transact business in this state shall continuously maintain in this state both:

(1) A registered agent, who shall be:

(a) An individual who resides in this state;

(b) A domestic business or nonprofit corporation with an office in this state; or

(c) A foreign business or nonprofit corporation authorized to transact business in this state with an office in this state; and

(2) A registered office of the foreign corporation, which shall be the address, including street and number, of the residence or office of the registered agent. [1989 c.1010 § 153]

OFFICIAL COMMENT TO ORS 65.721 (MODEL ACT § 15.07)

(1) *Proposed Changes to the Model Act*: The revisions reflect the changes proposed to ORS 65.111 by comparison with Model Act § 5.01, which deals with the same subject matter for domestic nonprofit corporations.

(2) *Effective Changes from Chapter 61 Provisions*: The proposal would permit a location other than a business office to be the registered office.

(3) *Relationship to the Oregon Business Corporation Act*: See comment to ORS 65.111.

65.724 CHANGE OF REGISTERED OFFICE OR REGISTERED AGENT OF FOREIGN CORPORATION

(1) A foreign corporation authorized to transact business in this state may change its registered office or registered agent by delivering to the Office of the Secretary of State for filing a statement of change that sets forth:

(a) The name of the foreign corporation;

(b) If the current registered office is to be changed, the address, including the street and number, of the new registered office;

(c) If the current registered agent is to be changed, the name of the new registered agent and a statement that the new agent has consented to the appointment; and

(d) A statement that after the change or changes are made, the street addresses of its registered office and the office or residence address of its registered agent will be identical.

(2) If the registered agent changes the street address of the agent's office or residence, the registered agent shall change the street address of the registered office of any foreign corporation for which the agent is the registered agent by notifying the corporation in writing of the change and signing, either manually or in facsimile, and delivering to the Office of the Secretary of State for filing a statement of change that complies with the requirements of subsection (1) of this section and recites that the corporation has been notified of the change.

(3) The filing of the statement under this section by the Office of the Secretary of State shall terminate the existing registered office or agent, or both, on the effective date of the filing by the Office of the Secretary of State and establish the newly appointed registered office or agent, or both, as that of the foreign corporation. [1989 c.1010 § 154]

OFFICIAL COMMENT TO ORS 65.724 (MODEL ACT § 15.08)

(1) *Proposed Changes to the Model Act*: The Model Act is revised to reflect changes previously made by ORS 65.114 by comparison with Model Act § 5.02, which deals with the same subject matter for domestic nonprofit corporations.

(2) *Effective Changes from Chapter 61 Provisions*: See comment to proposed ORS 65.114.

(3) *Relationship to the Oregon Business Corporation Act*: See comment to proposed ORS 65.114.

65.727 RESIGNATION OF REGISTERED AGENT OF FOREIGN CORPORATION

(1) The registered agent of a foreign corporation may resign as agent by delivering a signed statement of resignation to the Office of the Secretary of State for filing. The statement of resignation

may include a statement that the registered office is also discontinued.

(2) Upon receipt of the signed statement in proper form, the Secretary of State shall file the resignation statement and shall immediately notify the foreign corporation that the statement has been filed. The notice shall be addressed to the foreign corporation at the foreign corporation's mailing address or the foreign corporation's principal office as shown on the records of the Office of the Secretary of State.

(3) The agency appointment is terminated, and the registered office discontinued if so provided in the signed statement under subsection (1) of this section on the 31st day after the date on which the statement was filed by the Office of the Secretary of State unless the foreign corporation sooner appoints a successor registered agent as provided in ORS 65.724, thereby terminating the capacity of the prior agent. [1989 c.1010 § 155]

OFFICIAL COMMENT TO ORS 65.727 (MODEL ACT § 15.09)

(1) *Proposed Changes to the Model Act*: Subsections (1) and (2) merely describe the procedure used in the office of the Secretary of State to process the resignation of a registered agent. Changes reflect the existing practice in Oregon.

Subsection (3) of the Model Act provides that the agency is terminated on the 31st day after the resignation statement is filed. Language is added to the subsection to cover the situation where a successor registered agent is appointed during the 31-day period. In such a case, the former agency is terminated upon the appointment of the successor registered agent.

(2) *Effective Changes from Chapter 61 Provisions*: None.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal has been revised to parallel ORS 65.117 by comparison with Model Act § 5.03. The language in subsection (3) in particular was revised and clarified by ORS 65.117.

65.731 SERVICE ON FOREIGN CORPORATION

The provisions of ORS 60.731, relating to service on foreign corporations, shall apply to foreign nonprofit corporations, except that for the purpose of this section the reference therein to "this chapter" means chapter 65. [1989 c.1010 § 156]

OFFICIAL COMMENT TO ORS 65.731 (MODEL ACT § 15.10)

(1) *Proposed Changes to the Model Act*: As noted in comment (1) to ORS 65.121, the service provisions of the Model Act differ substantially from those of the Oregon Business Corporation Act, which is incorporated by reference in Chapter 61. Like ORS 65.121, this section incorporates by reference its counterpart in ORS Chapter 60 both for consistency with the Business Corporation Act and to avoid inadvertent conflict with the Oregon Rules of Civil Procedure.

(2) *Effective Changes from Chapter 61 Provisions*: None.

(3) *Relationship to the Oregon Business Corporation Act*: Incorporates by reference ORS 60.731.

(WITHDRAWAL)

65.734 WITHDRAWAL OF FOREIGN CORPORATION

(1) A foreign corporation authorized to transact business in this state may apply to the Office of the Secretary of State to withdraw from this state. The application shall set forth:

(a) The name of the foreign corporation and the name of the state or country under whose law it is incorporated;

(b) That it is not transacting business in this state and that it surrenders its authority to transact business in this state;

(c) That it revokes the authority of its registered agent to accept service on its behalf and appoints the Secretary of State as its agent for service of process in any proceeding based on a cause of action arising during the time it was authorized to transact business in this state;

(d) A mailing address to which the person initiating any proceedings may mail to the foreign corporation a copy of any process served on the Secretary of State under paragraph (c) of this subsection; and

(e) A commitment to notify the Secretary of State for a period of five years from the date of withdrawal of any change in the mailing address.

(2) Upon filing by the Office of the Secretary of State of the application to withdraw, the authority of the foreign corporation to transact business in this state shall cease. [1989 c.1010 § 157]

OFFICIAL COMMENT TO ORS 65.734 (MODEL ACT § 15.20)

(1) *Proposed Changes to the Model Act:* Model Act § 15.20(1)(c) is deleted because it is covered by ORS 65.731, which incorporates by reference ORS 60.731(2)(d). The Model Act requirement that the application for withdrawal contain a commitment to notify the Secretary of State “in the future” of any new mailing address is changed to a commitment to give such notice for a 5-year period. A new subsection (2) is added to fix the time that the authority of the foreign corporation to transact business ceases. Otherwise, the changes from the Model Act are largely stylistic, rather than substantive. In addition, the changes track those adopted in ORS 60.734.

(2) *Effective Changes from Chapter 61 Provisions:* None.

(3) *Relationship to the Oregon Business Corporation Act:* Identical to ORS 60.734.

(ADMINISTRATIVE REVOCATION OF AUTHORITY)

65.737 GROUNDS FOR ADMINISTRATIVE REVOCATION

The Secretary of State may commence a proceeding under ORS 65.741 to revoke the authority of a foreign corporation to transact business in this state if:

(1) The foreign corporation does not deliver its annual report to the Secretary of State within the time prescribed by this chapter;

(2) The foreign corporation does not pay within the time prescribed by this chapter any fees imposed by this chapter;

(3) The foreign corporation has failed to appoint or maintain a registered agent or registered office in this state as prescribed by this chapter;

(4) The foreign corporation does not inform the Secretary of State under ORS 65.724 or 65.727 that its registered agent or registered office has changed, that its registered agent has resigned, or that its registered office has been discontinued; or

(5) The Secretary of State receives a duly authenticated certificate from the official having custody of corporate records in the state or country under whose law the foreign corporation is incorporated stating that it has been dissolved or disappeared as the result of a merger. [1989 c.1010 § 158]

OFFICIAL COMMENT TO ORS 65.737 (MODEL ACT § 15.30)

(1) *Proposed Changes to the Model Act:* The changes to subsection (1) are made to clarify and to conform to existing Oregon terminology. Model Act § 15.30(a)(5) (intentional false filing) has become a ground for judicial revocation, ORS 65.171(a)(E).

Subsection (b) of the Model Act would permit the Attorney General to commence an administrative proceeding to revoke the authority of a foreign corporation to transact business in Oregon on grounds different from that under a proceeding brought by the Secretary of State. No comparable proceeding exists under present Oregon law. The grounds proposed for a proceeding commenced by the Attorney General require a much more intensive factual examination than do the grounds for a proceeding commenced by the Secretary of State. Under present law, the closest counterpart to an Attorney General revocation proceeding is found in the provisions dealing with judicial dissolution of domestic nonprofit corporations. See ORS 61.556 and 61.565. Given the goal of treating foreign corporations like domestic corporations to the greatest extent possible, it makes little sense to provide for a judicial dissolution of a domestic nonprofit corporation while not providing for a judicial revocation of authority of a foreign nonprofit corporation which commits the same violations.

Accordingly, provision for a proceeding to be commenced by the Attorney General is added as ORS 65.751 to 65.757.

(2) *Effective Changes from Chapter 61 Provisions:* None.

(3) *Relationship to the Oregon Business Corporation Act:* Almost identical to ORS 60.737, except for deletion of intentional false filing as explained in comment (1).

65.741 PROCEDURE FOR AND EFFECT OF ADMINISTRATIVE REVOCATION

(1) If the Secretary of State determines that one or more grounds exist under ORS 65.737 for revocation of authority of a foreign corporation to transact business in this state, the Secretary of State shall give the foreign corporation written notice of that determination.

(2) If the foreign corporation does not correct each ground for revocation or demonstrate to the reasonable satisfaction of the Secretary of State, within 45 days after notice is given, that each

ground for revocation determined by the Secretary of State does not exist, the Secretary of State shall administratively revoke the foreign corporation's authority and give the foreign corporation notice of the revocation, and in the case of a foreign corporation that would have been a public benefit corporation had it been incorporated in this state, shall notify the Attorney General in writing.

(3) The authority of a foreign corporation to transact business in this state ceases as of the date of revocation of its authority to transact business in this state.

(4) The Secretary of State's revocation of a foreign corporation's authority to transact business in this state appoints the Secretary of State the foreign corporation's agent for service of process in any proceeding based on a cause of action which arose during the time the foreign corporation was authorized to transact business in this state.

(5) Revocation of a foreign corporation's authority to transact business in this state terminates the authority of the registered agent of the corporation. [1989 c.1010 § 159; 1991 c.231 § 12]

OFFICIAL COMMENT TO ORS 65.741 (MODEL ACT § 15.31)

(1) *Proposed Changes to the Model Act*: Subsection (b) of the Model Act is deleted, as the Attorney General procedure is now covered at ORS 65.754 and 65.757. See commentary to ORS 65.737.

In subsection (2), 45 instead of 60 days are allowed for a foreign corporation to correct each ground for revocation or to demonstrate that a ground for revocation does not exist. In subsection (5), revocation of a foreign corporation's authority *does* terminate the authority of the registered agent under ORS 60.731(2)(b), incorporated into ORS 65.731 by reference. The last sentence of Model Act subsection (e) is deleted because the subject is now in ORS 65.731, incorporating ORS 60.731.

Otherwise, the changes to this section of the Model Act are stylistic and reflect the different terminology. The changes also conform this section to the existing language of Chapter 61.

(2) *Effective Changes from Chapter 61 Provisions*: The revocation procedure is governed and guided by the Oregon Administrative Procedures Act, ORS Chapter 183. That is made clear in the following section, ORS 65.744, Model Act § 15.32. The overlay of

the APA permits the skeletal description of procedure set forth in ORS 65.741.

(3) *Relationship to the Oregon Business Corporation Act*: The section is substantially identical to ORS 60.741.

OFFICIAL COMMENT TO 1991 LEGISLATIVE AMENDMENT

The deletion is made at the request of the Office of the Secretary of State with the assent of the Department of Justice.

65.744 APPEAL FROM ADMINISTRATIVE REVOCATION

In addition to any other legal remedy which may be available, a foreign corporation shall have the right to appeal the Secretary of State's revocation of its authority to transact business in this state pursuant to the provisions of ORS 183.310 to 183.550. Such revocation shall be reviewable pursuant to ORS 183.484 and shall not constitute a contested case order. [1989 c.1010 § 160]

OFFICIAL COMMENT TO ORS 65.744 (MODEL ACT § 15.32)

(1) *Proposed Changes to the Model Act*: The Model Act section is largely rejected in favor of the existing provision which properly refers to the Oregon Administrative Procedures Act as providing the ordinary vehicle for review of revocation.

(2) *Effective Changes from Chapter 61 Provisions*: The existing provision refers to a foreign corporation's right to appeal under the Oregon Administrative Procedures Act (ORS 183.310 to 183.550). Left open is the question whether such an appeal would constitute a review of a contested case (ORS 183.482) or of an order other than a contested case order (ORS 183.484). Given the basically ministerial grounds for administrative revocation set forth in Model Act § 15.30 and the existing practice of not holding contested case hearings on such matters, the Task Force chose to specify review under ORS 183.484 here, as in ORS 65.657(2). See commentary to ORS 65.657. The last sentence of ORS 65.744 is borrowed from ORS 279.019, which specifies review under ORS 183.484 where the Director of the Department of General Services exempts a public contract from the competitive bidding requirements of Chapter 279.

(3) *Relationship to the Oregon Business Corporation Act*: Identical to ORS 60.744, except for the addition of the second sentence. See preceding commentary.

**65.747 REINSTATEMENT FOLLOWING ADMINISTRATIVE
DISSOLUTION**

(1) A foreign corporation which has had its authority revoked under ORS 65.737 may apply to the Secretary of State for reinstatement. The application shall:

(a) State the name of the corporation and the effective date its authority was revoked; and

(b) State that the ground or grounds for revocation of authority either did not exist or have been eliminated.

(2) If the Secretary of State determines that the application contains the information required by subsection (1) of this section, that the information is correct and that the corporation's name satisfies the requirements of ORS 65.717, the Secretary of State shall reinstate the authority.

(3) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative revocation of authority and the corporation resumes carrying on its business as if the administrative revocation of authority had never occurred. [1989 c.1010 § 160a]

OFFICIAL COMMENT TO ORS 65.747 (MODEL ACT § (NONE))

(1) *Proposed Changes to the Model Act*: No counterpart.

(2) *Effective Changes From Chapter 61 Provisions*: None.

(3) *Relationship to the Oregon Business Corporation Act*: A parallel provision appears at ORS 60.747.

(JUDICIAL REVOCATION OF AUTHORITY)

65.751 GROUNDS FOR JUDICIAL REVOCATION

(1) The circuit courts may revoke the authority of a foreign corporation to transact business in this state:

(a) In a proceeding by the Attorney General if it is established that:

(A) The corporation obtained its authority to transact business in this state through fraud;

(B) The corporation has exceeded or abused the authority conferred upon it by law;

(C) The corporation would have been a public benefit corpora-

tion had it been incorporated in this state and its corporate assets are being misapplied or wasted;

(D) The corporation would have been a public benefit corporation had it been incorporated in this state and it is no longer able to carry out its purposes;

(E) An incorporator, director, officer or agent of the corporation signed a document knowing it was false in any material respect with the intent that the document be delivered to the Office of the Secretary of State for filing; or

(F) The corporation has fraudulently solicited money or has fraudulently used the money solicited.

(b) Except as provided in the articles or bylaws of a foreign corporation that would have been a religious corporation had it been incorporated in this state, in a proceeding by 50 members or members holding five percent or more of the voting power whichever is less, or by a director or any person specified in the articles, if it is established that:

(A) The directors are deadlocked in the management of the corporate affairs, and the members, if any, are unable to break the deadlock;

(B) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive or fraudulent;

(C) The members are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired;

(D) The corporate assets are being misapplied or wasted; or

(E) The corporation is a foreign corporation that would have been a public benefit or religious corporation had it been incorporated in this state, and is no longer able to carry out its purposes.

(c) In a proceeding by a creditor if it is established that:

(A) The creditor's claim has been reduced to judgment, the execution on the judgment returned unsatisfied, and the corporation is insolvent; or

(B) The corporation has admitted in writing that the creditor's claim is due and owing and the corporation is insolvent.

(2) Prior to revoking a corporation's authority, the court shall consider whether:

- (a) There are reasonable alternatives to revocation of authority;
- (b) Revocation of authority is in the public interest, if the corporation is a foreign corporation that would have been a public benefit corporation had it been incorporated in this state; or
- (c) Revocation of authority is the best way to protect the interests of members, if the corporation is a foreign corporation that would have been a mutual benefit corporation had it been incorporated in this state. [1989 c.1010 § 161]

OFFICIAL COMMENT TO ORS 65.751 (MODEL ACT § (NONE))

(1) *Proposed Changes to the Model Act:* The Model Act contains no provision for judicial revocation. Model Act §§ 15.30 and 15.31 provide for a proceeding to be initiated by the Attorney General on the grounds that the corporation has exceeded or abused its authority, or that the corporation would have been a public benefit corporation had it been incorporated in this state and that its corporate assets are being misapplied or wasted or that it is no longer able to carry out its purpose. However, the proceeding contemplated in the Model Act is administrative.

Subsection (1)(a)(A) is taken from ORS 65.661(1)(a)(A), Model Act § 14.30(a)(1)(i); it is a ground for judicial dissolution of a domestic business corporation. The grounds for an Attorney General proceeding set forth in the Model Act have been incorporated into subsections (1)(a)(B), (C) and (D). Subsection (1)(a)(E) is taken from ORS 60.737(5) as incorporated by ORS 61.732, corresponding to Model Act § 15.30(a)(5). See commentary in (2) below. Subsection (1)(a)(F) is taken from ORS 61.556 and is another ground for judicial dissolution of a domestic corporation. Except for the added ground of intentional false filing, the six grounds for judicial revocation in a proceeding before the Attorney General under this subsection parallel the grounds for judicial distribution in a proceeding before the Attorney General under ORS 65.661(a). See generally commentary to ORS 65.737.

In addition, the proposal permits members or creditors of the corporation to initiate a judicial proceeding to revoke the corporation's authority.

Subsection (2) requires the court to consider certain factors in determining whether revocation is an appropriate remedy; this subsection has no counterpart in the Model Act.

(2) *Effective Changes From Chapter 61 Provisions:* Revoking the authority of a foreign corporation is, in some ways, analogous to the involuntary dissolution of a domestic corporation. If a foreign corporation is to enjoy the same rights and privileges, and be subject to the same restrictions, as a domestic corporation, the grounds for involuntary revocation should parallel those for involuntary dissolution, insofar as the internal affairs of the foreign corporation are not thereby regulated by the state.

The proposed change is somewhat comparable to ORS 61.565 which provides for a proceeding in circuit court to dissolve a domestic nonprofit corporation under certain circumstances. Under ORS 60.661(1), the Attorney General may bring a proceeding to dissolve a domestic business corporation if it is established that the corporation obtained its articles of incorporation through fraud or has continued to exceed or abuse the authority conferred upon it by law. A provision synthesizing these two sections is proposed as ORS 65.664, Model Act § 14.30, to govern domestic nonprofit corporations. Added as additional grounds for revocation are the waste or misapplication of corporate assets, the inability of a public benefit corporation to carry out its purposes, the fraudulent use or solicitation of funds, and the execution of a false document by a corporate official with the intent that the document be filed with the Secretary of State. Under present Oregon law, the latter ground is a ground for administrative revocation by the Secretary of State. Believing that such a ground requires more intensive fact-finding than the other grounds for administrative revocation, it is included as a ground for judicial revocation instead.

(3) *Relationship to the Oregon Business Corporation Act:* No comparable provision for judicial revocation.

(4) *Other Comments:* Recommending a judicial proceeding, rather than an administrative one, for serious charges of wrongdoing is proposed as a safeguard in what could be, among other things, a politically sensitive area. A politically oriented nonprofit corporation could not have its authority revoked on the ground, for example, that it had continued to exceed or abuse its authority, without the procedural protection of a judicial proceeding. On the other hand, where the cause for revocation stems from a basically ministerial reason, such protection is not necessary.

65.754 PROCEDURE FOR JUDICIAL REVOCATION OF AUTHORITY

(1) Venue for a proceeding by the Attorney General to revoke a foreign corporation's authority lies in Marion County. Venue for a proceeding brought by any other person named in ORS 65.751 lies in the county where a corporation's principal Oregon office is located or where its registered office is or was last located.

(2) It is not necessary to make directors or members parties to a proceeding to revoke the authority of a corporation.

(3) A court in a proceeding brought to revoke a corporation's authority may issue injunctions, appoint a receiver or custodian pendente lite with all powers and duties the court directs, take other action required to preserve the corporate assets located in Oregon and carry on the corporation's Oregon activities until a full hearing can be held.

(4) A person other than the Attorney General who brings a revocation proceeding for a foreign corporation that would have been a public benefit or religious corporation had it been incorporated in this state, shall forthwith give written notice of the proceeding to the Attorney General who may intervene. [1989 c.1010 § 162]

OFFICIAL COMMENT TO ORS 65.754 (MODEL ACT § (NONE))

(1) *Proposed Changes to the Model Act:* No comparable Model Act provision. See commentary to ORS 65.737.

(2) *Effective Changes from Chapter 61 Provisions:* Chapter 61 contains no procedure for the judicial revocation of authority. The provision is patterned after ORS 61.565(2), (3), and (4), governing judicial dissolution. Subsection (4) is taken from ORS 65.664(4), Model Act § 14.31(d).

(3) *Relationship to the Oregon Business Corporation Act:* No comparable provision for judicial revocation.

65.757 DECREE OF REVOCATION

(1) If after a hearing the court determines that one or more grounds for judicial revocation of authority described in ORS 65.751 exists, it may enter a decree revoking the corporation's authority to transact business in Oregon and specifying the effective date of the revocation. The clerk of the court shall deliver a certified copy of the decree to the Office of the Secretary of State for filing.

(2) The authority of a foreign corporation to transact business in Oregon ceases as of the date of the decree of revocation.

(3) The decree of revocation of a foreign corporation's authority to transact business in this state appoints the Secretary of State the foreign corporation's agent for service of process in any proceeding based on a cause of action which arose during the time the foreign corporation was authorized to transact business in this state.

(4) Revocation of a foreign corporation's authority to transact business in this state terminates the authority of the registered agent of the corporation. [1989 c.1010 § 163]

OFFICIAL COMMENT TO ORS 65.757 (MODEL ACT § (NONE))

(1) *Proposed Changes to the Model Act:* There is no comparable provision in the Model Act. See commentary to ORS 65.737.

(2) *Effective Changes from Chapter 61 Provisions:* This section is modeled after ORS 61.591 and 60.671 relating to judicial decrees of dissolution.

(3) *Relationship to the Oregon Business Corporation Act:* No provision for judicial revocation.

RECORDS AND REPORTS**(RECORDS)****65.771 CORPORATE RECORDS**

(1) A corporation shall keep as permanent records minutes of all meetings of its members and board of directors, a record of all corporate action taken by the members or directors without a meeting, and a record of all actions taken by committees of the board of directors in place of the board of directors on behalf of the corporation.

(2) A corporation shall maintain appropriate accounting records.

(3) A corporation or its agent shall maintain a record of its members in a form that permits preparation of a list of the name and address of all members, in alphabetical order by class showing the number of votes each member is entitled to vote.

(4) A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.

(5) A corporation shall keep a copy of the following records for inspection:

- (a) Articles or restated articles of incorporation and all amendments to them currently in effect;
- (b) Bylaws or restated bylaws and all amendments to them currently in effect;
- (c) Resolutions adopted by its board of directors relating to the characteristics, qualifications, rights, limitations and obligations of members of any class or category of members;
- (d) The minutes of all meetings of members and records of all actions approved by the members for the past three years;
- (e) Written communications required by this chapter and those regarding general membership matters made to members within the past three years;
- (f) A list of the names and business or home addresses of its current directors and officers;
- (g) The last three annual financial statements, if any. The statements may be consolidated or combined statements of the corporation and one or more of its subsidiaries or affiliates, as appropriate, including a balance sheet and statement of operations, if any, for that year. If financial statements are prepared for the corporation on the basis of generally accepted accounting principles, the annual financial statements must also be prepared on that basis;
- (h) The last three accountant's reports if annual financial statements are reported upon by a public accountant; and
- (i) The most recent annual report delivered to the Secretary of State under ORS 65.787. [1989 c.1010 § 164]

OFFICIAL COMMENT TO ORS 65.771 (MODEL ACT § 16.01)

(1) *Proposed Changes to the Model Act:* Subsection (1) was amended to insert a paraphrase in place of the ambiguously worded cross-reference to Model Act § 8.25(d), corresponding to ORS 65.354(4). The change makes subsection (1) essentially identical to the language of ORS 60.771(1).

Subsection (5)(e) was amended to require keeping only general membership matters for three years. Subsection (5)(g) was added to require that annual financial statements are maintained for inspection rather than requiring that an annual financial statement to be furnished to each member.

(2) *Effective Changes from Chapter 61 Provisions:* Current law does not specify what records must be kept. This section states what must be kept, specifies which records must be kept permanently, and it restricts the location of the records to the corporation's principal office.

These changes provide more definite guidelines regarding record-keeping.

(3) *Relationship to the Oregon Business Corporation Act:* This section parallels ORS 60.771.

65.774 INSPECTION OF RECORDS BY MEMBERS

(1) Subject to subsection (5) of this section and ORS 65.777 (3), a member is entitled to inspect and copy, at a reasonable time and location specified by the corporation, any of the records of the corporation described in ORS 65.771 (5) if the member gives the corporation written notice of the member's demand at least five business days before the date on which the member wishes to inspect and copy.

(2) Subject to subsection (5) of this section, a member is entitled to inspect and copy, at a reasonable time and reasonable location specified by the corporation, any of the following records of the corporation if the member meets the requirements of subsection (3) of this section and gives the corporation written notice of the member's demand at least five business days before the date on which the member wishes to inspect and copy:

(a) Excerpts from any records required to be maintained under ORS 65.771 (1), to the extent not subject to inspection under subsection (1) of this section;

(b) Accounting records of the corporation; and

(c) Subject to ORS 65.782, the membership list.

(3) A member may inspect and copy the records identified in subsection (2) of this section only if:

(a) The member's demand is made in good faith and for a proper purpose;

(b) The member describes with reasonable particularity the purpose and the records the member desires to inspect; and

(c) The records are directly connected with this purpose.

(4) This section does not affect:

(a) The right of a member to inspect records under ORS 65.224

or, if the member is in litigation with the corporation, to the same extent as any other litigant; or

(b) The power of the court, independently of this chapter, to compel the production of corporate records for examination.

(5) (a) The articles or bylaws of a religious corporation may limit or abolish the right of a member under this section to inspect and copy any corporate record.

(b) The articles of a public benefit corporation organized primarily for political or social action, including but not limited to political or social advocacy, education, litigation or a combination thereof, may limit or abolish:

(A) The right of a member to obtain from the corporation information as to the identity of contributors to the corporation; and

(B) The right of a member or the member's agent or attorney to inspect or copy the membership list if the corporation provides a reasonable means to mail communications to other members through the corporation at the expense of the member making the request. [1989 c.1010 § 165]

OFFICIAL COMMENT TO ORS 65.774 (MODEL ACT § 16.02)

(1) *Proposed Changes to the Model Act:* There are changes requiring a member's written notice of the member's demand rather than using "written notice" or "written demand." The amendment results in parallel language to ORS 60.774. A special provision that goes beyond the Model Act has been added to further assure the ability of nonprofit corporations to restrict access to the membership list and the names of contributors of political advocacy and social action public benefit corporations. See commentary to ORS 65.224.

(2) *Effective Changes from Chapter 61 Provisions:* Current law is very general and does not provide the corporation with guidelines to decide whether the purpose of the requested inspection is proper and which records may be inspected. The current law affords a remedy if the corporation is not reasonable, but the remedy requires the member to have the courts enforce the member's rights.

(3) *Relationship to the Oregon Business Corporation Act:* This section parallels ORS 60.774.

65.777 SCOPE OF INSPECTION RIGHT

(1) A member's agent or attorney has the same inspection and copying rights as the member the agent or attorney represents.

(2) The right to copy records under ORS 65.774 includes, if reasonable, the right to receive copies made by photographic, xerographic or other means.

(3) The corporation may impose a reasonable charge, covering the costs of labor and material, for copies of any documents provided to the member. The charge may not exceed the estimated cost of production or reproduction of the records.

(4) The corporation may comply with a member's demand to inspect the record of members under ORS 65.774 (2)(c) by providing the member with a list of its members that was compiled no earlier than the date of the member's demand. [1989 c.1010 § 166]

OFFICIAL COMMENT TO ORS 65.777 (MODEL ACT § 16.03)

(1) *Proposed Changes to the Model Act:* None.

(2) *Effective Changes from Chapter 61 Provisions:* Current law does not afford guidelines for compliance with a members request to inspect.

(3) *Relationship to the Oregon Business Corporation Act:* This section parallels ORS 60.777.

65.781 COURT-ORDERED INSPECTION

(1) If a corporation does not allow a member who complies with ORS 65.774 (1) to inspect and copy any records required by ORS 65.774 (1) to be available for inspection, the circuit court in the county where the corporation's principal office, or, if none in this state, its registered office, is located may summarily order inspection and copying of the records demanded at the corporation's expense upon application of the member.

(2) If a corporation does not within a reasonable time allow a member to inspect and copy any other record, the member who complies with ORS 65.774 (2) and (3) may apply to the circuit court in the county where the corporation's principal office, or, if none in this state, its registered office, is located for an order to permit inspection and copying of the records demanded.

(3) If the court orders inspection and copying of the records demanded, it shall also order the corporation to pay the member's

costs, including reasonable attorney fees, incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the member to inspect the records demanded.

(4) If the court orders inspection and copying of the records demanded, it may impose reasonable restrictions on the use or distribution of the records by the demanding member.

(5) No order shall be issued under this section without notice to the corporation at least five days in advance of the time specified for the hearing unless a different period is fixed by the court. The member's request shall be set for hearing at the earliest possible time and shall take precedence over all matters, except matters of the same character and hearings on preliminary injunctions under ORCP 79 B.(3). [1989 c.1010 § 167]

OFFICIAL COMMENT TO ORS 65.781 (MODEL ACT § 16.04)

(1) *Proposed Changes to the Model Act*: Subsection (5) has been added.

(2) *Effective Changes from Chapter 61 Provisions*: This section provides more guidance to the courts by specifying which records must be furnished, the requirements for inspection and guidelines for the judicial proceedings.

(3) *Relationship to the Oregon Business Corporation Act*: This section parallels ORS 60.781.

65.782 LIMITATIONS ON USE OF MEMBERSHIP LIST

Without consent of the board, a membership list or any part of a membership list may not be obtained or used by any person for any purpose unrelated to a member's interest as a member. Without limiting the generality of this section, without the consent of the board, a membership list or any part thereof may not be:

(1) Used to solicit money or property unless such money or property will be used solely to solicit the votes of the members in an election to be held by the corporation;

(2) Used for any commercial purpose; or

(3) Sold or purchased by any person. [1989 c.1010 § 168]

OFFICIAL COMMENT TO ORS 65.782 (MODEL ACT § 16.05)

(1) *Proposed Changes to the Model Act*: None.

(2) *Effective Changes from Chapter 61 Provisions*: This section provides guidelines to determine whether the proposed use of the membership list is proper. It also provides protection to members by requiring board approval of the sale of a membership list or its use for commercial purposes.

(3) *Relationship to the Oregon Business Corporation Act*: There is no parallel section.

NOTE: The proposal omits Model Act § 16.20 (financial statements for members).

(REPORTS)

65.784 REPORT TO MEMBERS AND OTHER PERSONS OF INDEMNIFICATION

If a corporation indemnifies or advances expenses to a director under ORS 65.391 to 65.401 in connection with a proceeding by or in the right of the corporation, the corporation shall report the indemnification or advance in writing to:

(1) The members with or before the notice of the next meeting of members; and

(2) Any person having the right to designate or appoint the director no later than 90 days after the first indemnification or advance. [1989 c.1010 § 169; 1991 c.231 § 13]

OFFICIAL COMMENT TO ORS 65.784 (MODEL ACT § 16.21)

(1) *Proposed Changes to the Model Act*: See Official Comment to 1991 Legislative Amendment below.

(2) *Effective Changes from Chapter 61 Provisions*: This requires a report to the members when there has been an indemnification or an advancement of expenses to a director. Current law does not require reporting this to members.

(3) *Relationship to the Oregon Business Corporation Act*: This section parallels ORS 60.784.

OFFICIAL COMMENT TO 1991 LEGISLATIVE AMENDMENT

The purpose of the additional language is to afford notice, similar to that afforded members, to persons having designation or appointment rights in the event of indemnification or advance of expenses.

65.787 ANNUAL REPORT

(1) Each domestic corporation, and each foreign corporation authorized to transact business in this state, shall by its anniversary deliver to the Office of the Secretary of State for filing an annual report that sets forth:

(a) The name of the corporation and the state or country under whose law it is incorporated;

(b) The street address of the registered office and the name of the registered agent at that office in this state;

(c) If the registered agent is changed, that the new registered agent has consented to the appointment;

(d) The address including street and number and mailing address if different from its principal office;

(e) The names and addresses of the president and secretary of the corporation;

(f) A brief description of the nature of the activities of the corporation;

(g) Whether or not it has members;

(h) If it is a domestic corporation, whether it is a public benefit, mutual benefit or religious corporation;

(i) If it is a foreign corporation, whether it would be public benefit, mutual benefit or religious corporation had it been incorporated in this state;

(j) The federal employer identification number of the corporation; and

(k) Additional identifying information that the Secretary of State may require by rule.

(2) The information contained on the annual report shall be current as of 30 days before the anniversary of the corporation.

(3) The Secretary of State shall mail the annual report form to any address shown for the corporation in the current records of the office. The failure of the corporation to receive the annual report form from the Secretary of State shall not relieve the corporation of its duty to deliver an annual report to the office as required by this section.

(4) If an annual report does not contain the information required by this section, the Secretary of State shall promptly notify the reporting domestic or foreign corporation in writing and return the

report to it for correction. The domestic or foreign corporation must correct the error within 45 days after the Secretary of State gives such notice.

(5) A domestic or foreign corporation may deliver to the Office of the Secretary of State for filing an amendment to the annual report if a change in the information set forth in the annual report occurs after the report is delivered to the Office of the Secretary of State for filing and before the next anniversary. This subsection applies only to a change that is not required to be made by an amendment to the articles of incorporation. The amendment to the annual report must set forth:

(a) The name of the corporation as shown on the records of the Office of the Secretary of State; and

(b) The information as changed. [1989 c.1010 § 170]

OFFICIAL COMMENT TO ORS 65.787 (MODEL ACT § 16.22)

(1) *Proposed Changes to the Model Act:* Subsection (1) was changed to provide that the annual report shall be delivered by its anniversary to the office for filing. Specifications regarding the address have also been changed to require street addresses of the registered office and street and mailing addresses of the principal office. Subsection (1)(c) was amended to require a change of registered agent to include a statement that the new registered agent consented to the appointment. There was an amendment of subsection (1)(e) to delete naming all directors, but specify the president and secretary. Subsection (1)(j) requiring disclosure of the federal employer number was added. Subsection (1)(k) requiring additional information that the Secretary of State may require by rule was added.

Subsection (3) requires the Secretary of State to mail an annual report form to the corporation's current address, but the corporation must file an annual report whether it receives the form or not.

Subsection (4) was amended to provide 45 days rather than 30 days to correct an error.

Subsection (5) was added to allow an amended annual report to be filed when changes are made after the annual report and before the next anniversary when the changes do not require an amendment to the articles of incorporation.

These changes were made to conform ORS 65.787, Model Act § 16.22, to the provisions of ORS 60.787.

(2) *Effective Changes from Chapter 61 Provisions*: See comments above.

(3) *Relationship to the Oregon Business Corporation Act*: This section parallels ORS 60.787.

MISCELLANEOUS

65.951 SHORT TITLE

ORS 65.001 to 65.787 and 65.951 to 65.967 shall be known and may be cited as the Oregon Nonprofit Corporation Act. [1989 c.1010 § 1]

OFFICIAL COMMENT TO ORS 65.951 (MODEL ACT § 1.01)

- (1) *Proposed Changes to the Model Act*: None.
- (2) *Effective Changes from Chapter 61 Provisions*: None, except the word "Law" is changed to "Act."
- (3) *Relationship to the Oregon Business Corporation Act*: Parallels ORS 60.951.

65.954 RESERVATION OF POWER TO AMEND OR REPEAL

All or part of this chapter may be amended, repealed or modified at any time and all domestic and foreign corporations subject to this chapter are governed by the amendment, repeal or modification. [1989 c.1010 § 2]

OFFICIAL COMMENT TO ORS 65.954 (MODEL ACT § 1.02)

- (1) *Proposed Changes to the Model Act*: The Model Act language is modified to conform to ORS Chapter 60, without substantive change.
- (2) *Effective Changes from Chapter 61 Provisions*: There is no substantive change from existing law, but the language has been conformed to the Business Corporation Act.
- (3) *Relationship to the Oregon Business Corporation Act*: The proposal parallels ORS 60.954.
- (4) *Other Comments*: While ORS 65.954 may not be necessary, it was included in accordance with Model Act § 1.02 to clearly address any lingering concern that a state cannot, without explicitly reserving the right, apply later statutory changes to preexisting corporations.

65.957 APPLICATION TO EXISTING DOMESTIC CORPORATIONS

(1) This chapter applies to all domestic corporations in existence on October 3, 1989, that were incorporated under any general statute of this state providing for incorporation of nonprofit corporations if power to amend or repeal the statute under which the corporation was incorporated was reserved.

(2) Without limitation as to any other corporations which may be outside the scope of subsection (1) of this section, this chapter does not apply to the following:

- (a) The Oregon State Bar and the Oregon State Bar Professional Liability Fund created under ORS chapter 9;
- (b) The Oregon Resource and Technology Development Corporation created under ORS chapter 284;
- (c) The State Accident Insurance Fund Corporation created under ORS chapter 656;
- (d) The Oregon Insurance Guaranty Association and the Oregon Life and Health Insurance Guaranty Association created under ORS chapter 734; and
- (e) The Oregon FAIR Plan Association and the Oregon Medical Insurance Pool created under ORS chapter 735.
- (3) A public benefit corporation that has less than three directors on October 3, 1989, shall comply with ORS 65.307 (1) by October 3, 1990. [1989 c.1010 § 172]

OFFICIAL COMMENT TO ORS 65.957 (MODEL ACT § 17.01)

- (1) *Proposed Changes to the Model Act*: In subsection (1), the revisions to the Model Act correspond to the language of ORS 60.957. Subsection (2) as added, expressly excludes certain quasi-public agencies. The list of agencies was prepared by the Attorney General. Subsection (3) allows a year's transition for a public benefit corporation to have three directors.
- (2) *Effective Changes from Chapter 61 Provisions*: No comparable provision.
- (3) *Relationship to the Oregon Business Corporation Act*: Subsection (1) is parallel to ORS 60.957.
- (4) *Other Comments*: By reason of subsection (1), on the effective date of the Act all existing Oregon nonprofit corporations will fall into one of the following categories: religious corporations,

public benefit corporations and mutual benefit corporations. *See* ORS 65.001, Model Act § 1.40 for definitions. Pursuant to ORS 65.787(1)(h), Model Act § 16.22(a)(7), each domestic nonprofit corporation must state in its annual report filed with the office of the Secretary of State whether it is a public benefit, mutual benefit or religious corporation. A person signing a document to be filed with the Secretary of State knowing it to be false in any material respect commits the crime of falsely signing a document for filing. *See* ORS 65.990, Model Act § 1.29. Pursuant to ORS 65.024(2), documents filed with the Office of the Secretary of State may be used as prima facie evidence of the facts stated therein. A domestic nonprofit corporation wishing to make the category into which it falls a matter of public record prior to the time for filing its next annual report may do so by adopting and filing an amendment to its articles of incorporation pursuant to ORS 65.434, Model Act § 10.02.

65.961 APPLICATION TO QUALIFIED FOREIGN CORPORATIONS

A foreign corporation authorized to engage in activities in his state on October 3, 1989, is subject to this chapter but is not required to apply for new authority to engage in activities under this chapter. [1989 c.1010 § 173]

OFFICIAL COMMENT TO ORS 65.961 (MODEL ACT § 17.02)

(1) *Proposed Changes to the Model Act:* The revisions to the Model Act correspond to the language of ORS 60.961.

(2) *Effective Changes from Chapter 61 Provisions:* No comparable provision.

(3) *Relationship to the Oregon Business Corporation Act:* The provision is parallel to ORS 60.961.

(4) *Other Comments:* By reason of this provision, on the effective date of the Act all existing qualified foreign corporations will be treated as a corporation that would be public benefit, mutual benefit or religious had it been incorporated in this state. *See, e.g.,* ORS 65.751 to 65.757. Pursuant to ORS 65.787(1)(i), Model Act § 16.22(a)(8), each qualified foreign corporation must state in its annual report into which of these three classes it would fall if it were domestic. *See* Commentary to ORS 65.957.

65.964 SAVING PROVISIONS

(1) Except as provided in subsections (2), (3) and (4) of this section, the repeal of a statute by chapter 1010, Oregon Laws 1989, does not affect:

(a) The operation of the statute or any action taken under it before its repeal;

(b) Any ratification, right, remedy, privilege, obligation or liability acquired, accrued or incurred under the statute before its repeal;

(c) Any violation of the statute, or any penalty, forfeiture or punishment incurred because of the violation, before its repeal; or

(d) Any proceeding, reorganization or dissolution commenced under the statute before its repeal. The proceeding, reorganization or dissolution may be completed in accordance with the statute as if it had not been repealed.

(2) The provisions of ORS 65.387 to 65.414 shall apply to all indemnification made by a corporation after October 3, 1989, and all other actions regarding indemnification taken by or on behalf of a corporation or by a court after October 3, 1989, including all indemnification made and other actions taken after October 3, 1989, with respect to claims that arose or matters that occurred prior to October 3, 1989, or pursuant to any provisions of any articles of incorporation, bylaws, resolutions or agreements in effect prior to October 3, 1989.

(3) If a penalty or punishment imposed for violation of a statute repealed by chapter 1010, Oregon Laws 1989, is reduced by this chapter, the penalty or punishment, if not already imposed, shall be imposed in accordance with this chapter.

(4) This chapter shall apply to any amendment to a corporation's articles of incorporation filed after October 3, 1989, even if member approval of such amendment occurred prior to October 3, 1989.

(5) Except as specifically provided in this chapter, nothing in this chapter shall affect any powers the Attorney General may have under other statutes or common law. [1989 c.1010 § 174]

OFFICIAL COMMENT TO ORS 65.964 (MODEL ACT § 17.03)

(1) *Proposed Changes to the Model Act:* The revisions to the Model Act correspond to the language of ORS 60.964. Model Act Subsection (a)(5) has been deleted, in part because, with respect to actions taken by members or directors, it is a subcategory of actions

covered by ORS 65.964(1)(a), and in part because it conflicts with ORS 65.964(4) which was added to be parallel to ORS 60.964. ORS 65.964(5) is added to make clear that the bill is not intended to affect the Attorney General's powers.

(2) *Effective Changes from Chapter 61 Provisions*: No comparable provision.

(3) *Relationship to the Oregon Business Corporation Act*: The provision is parallel to ORS 60.964.

65.967 SEVERABILITY

If any provision of this chapter or its application to any person or circumstance is held invalid by a court of competent jurisdiction, the invalidity does not affect other provisions or applications of this chapter that can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable. [1989 c.1010 § 175]

OFFICIAL COMMENT TO ORS 65.967 (MODEL ACT § 17.04)

(1) *Proposed Changes to the Model Act*: None.

(2) *Effective Changes from Chapter 61 Provisions*: No comparable provision.

(3) *Relationship to the Oregon Business Corporation Act*: The provision is parallel to ORS 60.971.

PENALTY

65.990 PENALTY FOR SIGNING FALSE DOCUMENT

(1) A person commits the crime of falsely signing a document for filing if the person signs a document knowing it is false in any material respect with intent that the document be delivered to the Office of the Secretary of State for filing.

(2) Violation of subsection (1) of this section is a Class B misdemeanor. [1989 c.1010 §§ 12, 171]

OFFICIAL COMMENT TO ORS 65.990 (MODEL ACT § 1.29)

(COMMENTARY TO BILL § 12)

(1) *Proposed Changes to the Model Act*: The Model Act lan-

guage has been changed to parallel ORS Chapter 60 and Oregon's criminal code but there is no substantive change.

(2) *Effective Changes from Chapter 61 Provisions*: This section adds a penalty which does not exist in present law.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal parallels ORS 60.990(1). Legislative counsel divided Model Act § 1.29 into Bill §§ 12 and 171. Later, both bill sections were incorporated into ORS 65.990.

(COMMENTARY TO BILL § 171)

(1) *Proposed Changes to the Model Act*: The proposal fills in the blanks in the Model Act to conform to ORS 60.990(1).

(2) *Effective Changes from Chapter 61 Provisions*: ORS Chapter 61 has no counterpart. *See* comment to ORS 65.990.

(3) *Relationship to the Oregon Business Corporation Act*: The proposal parallels ORS 60.990. Legislative counsel divided Model Act § 1.29 into Bill §§ 12 and 171. Later, both bill sections were incorporated into ORS 65.990.

(4) *Other Comments*: In determining what penalty would be appropriate to this offense, the Task Force followed the provisions of ORS 60.990 which in turn are consistent with ORS 162.085 (which makes an unsworn falsification to a public official in order to obtain some benefit a Class B misdemeanor). A Class B misdemeanor carries a risk of \$1,000 for individuals (ORS 161.635) and \$2,500 for corporations (ORS 161.655). Misdemeanors, of any class, may also entail jail terms of up to one year (ORS 161.545).

While the Task Force believes that classifying the offense as a "violation" under ORS 161.565, carrying an individual fine of up to \$250 (corporate \$500), no potential jail time and no civil disabilities, would be the more appropriate, the Class B misdemeanor was retained for consistency with ORS Chapter 60 and ORS 162.085, and with recognition that judicial discretion can be used to achieve a proper result. *See* ORS 161.565(2).

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